TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 600

THE UNITED STATES OF AMERICA, PETITIONER

vs.

GEORGE W. NORRIS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 24, 1936
CERTIORARI GRANTED FEBRUARY 1, 1937

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INDEX

	Original	Print
Proceedings in U. S. C. C. A., Eighth Circuit	A	1
Caption [omitted in printing]	A	1
Record from D. C. U. S., District of Nebraska	1	1
Caption [omitted in printing]	1	1
Indictment	2	1
Demurrer of defendant to indictment	11	8
Overruling of demurrer to indictment	13	10
Arraignment and plea of not guilty; jury empaneled; trial, December 9, 1935	13	11
Trial, December 10, 1935	14	11
Trial, December 11, 1935	14	12
Trial, December 12, 1935; Verdict	14	12
Motion of defendant for new trial	15	13
Order overruling motion for new trial; judgment	17	14
Judgment and sentence	17	14
Notice of appeal	18	15
Grounds of appeal	18	15
Duplicate notice of appeal filed in Appellate Court	19	16
Order of District Court granting time to file bill of exceptions and assignment of errors, etc	20	16
Bond on appeal [omitted in printing]	21	17
Assignment of errors	22	17
Bill of exceptions	26	20
Caption	26	20
Testimony for plaintiff	26	20
Plaintiff's exhibits	26	20
1—Senate Resolution No. 215, April 10, 1930	26	20
2—Extracts from Senate Journal relating to appointment of committee	27	21

	Original	Print
Record from D. C. U. S., District of Nebraska—Continued.		
Bill of exceptions—Continued.		
Testimony for plaintiff—Continued.		
Plaintiff's exhibits—Continued.		
3—Proclamation of Governor of Nebraska for primary election, etc	28	21
4—Application of George W. Norris of McCook, Nebraska, as candidate for United States Senate	28	22
5—Application of George W. Norris of Broken Bow, Nebraska, as candidate for United States Senate	29	22
6—Petitions of voters of Nebraska requesting that name of W. M. Stebbins be placed upon ballot	29	23
7—Acceptance by W. M. Stebbins of nomination for United States Senate	29	23
John Andrews	30	23
Plaintiff's exhibits	30	23
8-A—Minutes of Senate committee, May 18, 1930	30	24
8-B—Minutes of Senate subcommittee at Broken Bow, July 19, 1930	30	24
8-C—Minutes of Senate subcommittee at Lincoln, July 21, 1930	30	24
8-D—Minutes of Senate subcommittee at Lincoln, September 22, 1930	30	24
William M. Day	32	25
A. Paul Johnson	34	27
Frank Healy	38	31
Victor Seymour	39	31
Plaintiff's exhibit 13—Judgment of Supreme Court of Nebraska in the case of State of Nebraska ex rel Robert Smith, vs. Frank Marsh, Secretary of State of Nebraska	40	32
Testimony for defendant	41	33
William M. Day	41	33
George W. Norris	43	34
William M. Day (recalled)	47	38
Motion of defendant for directed verdict and overruling thereof	48	38
Court's instructions to the jury	48	39
Instructions to jury requested by defendant and refusal thereof	60	48
Praecipe for transcript	61	49
Stipulation of counsel approving bill of exceptions	62	50
Approval of bill of exceptions by District judge	62	50
Clerk's certificate to transcript [omitted in printing]	63	51
Appearances of counsel [omitted in printing]	64	51
Order of submission	65	51
Opinion, Faris, J	66	51
Judgment	78	60
Clerk's certificate [omitted in printing]	79	60
Order allowing certiorari	80	60

A [Captions omitted.]

1 In United States District Court for the District of Nebraska, Lincoln Division

No. 1557—Criminal

United States of America, plaintiff

vs.

George W. Norris, defendant

2 *Indictment*

(Count One only)

Filed June 23, 1931

United States of America,
District of Nebraska, Lincoln Division, ss:

In the District Court of the United States within and for the Lincoln Division of the District of Nebraska in the Eighth Judicial Circuit.

The grand jurors of the United States of America, drawn from the territory comprising the Lincoln, Hastings, and McCook Divisions of the District of Nebraska, and sitting in the Lincoln Division of said District, in the term beginning the eleventh day of May, in the year nineteen hundred thirty-one, being first duly empanelled, sworn and charged by said court to inquire within and for said Divisions, upon their oaths do present.

That on the eighth day of April, in the year nineteen hundred thirty, the same being the calendar day of April 10, 1930, the Senate of the United States of America did adopt a certain Resolution (Senate Resolution Number 215), that is to say, a Resolution of the tenor following:

"Resolved, That a special committee consisting of five Senators, to be appointed by the Vice-President, is hereby authorized and directed to investigate the campaign expenditures of the various candidates for the United States Senate, the names of the persons, firms, or corporations subscribing, the amount contributed, the method of expenditure of said sums, and all facts in relation thereto, not only as to the subscriptions of money and expenditures thereof but as to the use of any other means or influence, including the promise or use of patronage, and all other facts in relation thereto which would not only be of public interest but which would aid the Senate in enacting any remedial legislation or in deciding any contest which might be instituted involving the right to a seat in the United States Senate.

"The investigation hereby provided for, in all the respects above enumerated, shall apply to candidates and contests before senatorial primaries, senatorial conventions and the contests and campaign terminating in the general election in November 1930.

"No Senator shall be appointed upon said committee from a state in which a Senator is to be elected in the general election in 1930.

3 "Said committee is hereby authorized to act upon ts own initiative and upon such information as in its judgment may be reasonable or reliable. Upon complaint being made before said committee under oath by any person, persons, senatorial candidate, or political committee, setting forth allegations as to facts which under this resolution it would be the duty of said committee to investigate, the said committee shall investigate such charges as fully as though it were acting upon its own motion, unless after a hearing upon such complaint the committee shall find that the allegations in said complaint are immaterial or untrue.

"Said committee is hereby authorized in the performance of its duties to sit at such times and places, either in the District of Columbia or elsewhere, as it deems necessary or proper. It is specifically authorized to require the attendance of witnesses by subpœna or otherwise; to require the production of books, papers, and documents; and to employ counsel, experts, clerical, and other assistants; and to employ stenographers at a cost not exceeding 25 cents per one hundred words.

"Said committee is hereby specifically authorized to act through any subcommittee authorized to be appointed by said committee. The chairman of said committee or any member of any subcommittee may administer oaths to witnesses and sign subpœnas for witnesses; and every person duly summoned before said committee, or any subcommittee thereof, who refuses or fails to obey the process of said committee or who appears and refuses to answer questions pertinent to said investigation shall be punished as prescribed by law.

"The expenses of said investigation, not exceeding in the aggregate $100,000, shall be paid from the contingent fund of the Senate on vouchers signed by the chairman of the committee or the chairman of any subcommittee.

"All hearings before said committee shall be public and all orders or decisions of the committee shall be public.

"The committee shall make a full report to the Senate on the first day of the next session of the Congress."

That thereafter, to-wit, on the seventeenth day of April, in the year nineteen hundred thirty, pursuant to said Resolution aforesaid, the Honorable Charles Curtis, Vice-President of the United States of America did appoint as members of said Special Committee on Senatorial Campaign Expenditures, the following members of the United States Senate:

Mr. Gerald P. Nye of North Dakota,
Mr. Porter H. Dale of Vermont,
Mr. C. C. Dill of Washington,
Mr. Roscoe C. Patterson of Missouri,
Mr. Robert F. Wagner of New York.

That thereafter, to-wit, on the eighteenth day of May, in the year nineteen hundred thirty, at a meeting of the members of said committee, at which four of the members of said committee, to-wit, Mr. Gerald P. Nye, Mr. Porter H. Dale, Mr. C. C. Dill, and Mr. Robert F. Wagner were present, action was taken by said committee as follows:

"A discussion of future procedure was had. The Chairman was unanimously authorized to act as a sub-committee and to appoint subcommittees of one or more members to hold hearings as in his judgment was desirable."

That the twelfth day of August, in the year nineteen hundred thirty, the same being the second Tuesday in August, was designated by the Laws of the State of Nebraska and by Honorable Arthur J. Weaver, Governor of the State of Nebraska, by Proclamation duly issued, for the holding of a Primary election for the nomination by the several political parties of candidates for different public offices to be voted for at the general election in the year nineteen hundred thirty. Among the officers to be elected at the said general election, nominations for which should be made at the said Primary election, as provided by law and by the Proclamation aforesaid, was that of one United States Senator from Nebraska.

More than forty days prior to the aforesaid Primary Election, an application had been duly filed in the office of the Secretary of State of the State of Nebraska, by and on behalf of George W. Norris of McCook, Nebraska, requesting that his name be placed upon the official ballot of the Republican party for the Primary election to be held on the twelfth day of August in the year nineteen hundred thirty, as a candidate for United States Senator, and an application had been duly filed in the office of the Secretary of State of the State of Nebraska by and on behalf of George W. Norris, of Broken Bow, Nebraska, requesting that his name be placed upon the official ballot of the Republican party for the Primary election to be held on the twelfth day of August, in the year nineteen hundred thirty, as a candidate for United States Senator, and a statement in writing was filed within the time fixed by law by W. M. Stebbins of Gothenburg, Nebraska, as provided by law, accepting a written application duly filed by sufficient qualified voters of the State of Ne-
5 braska, requesting that said W. M. Stebbins' name be placed upon the official Primary ballot of the Republican party for the Primary election to be held the twelfth day of August, in the year nineteen hundred thirty, as aforesaid, as a candidate for the office of United States Senator from Nebraska.

That the Honorable Gerald P. Nye was the chairman of said Special Committee, on Senatorial Campaign Expenditures aforesaid, and the Honorable Porter H. Dale, a member of said Special Committee, said Gerald P. Nye and Porter H. Dale having theretofore been appointed as a Sub-committee by said Chairman, Honorable Gerald P. Nye, by authority of said Resolution of the United States Senate and by authority of the said action of said Special Committee with reference to Sub-committees above set forth, on the twenty-second day of September, in the year nineteen hundred thirty, in the United States Court Room in the United States Court House and Post Office Building in the City of Lincoln, Lancaster county, in the State and District of Nebraska, entered into a public hearing, the Chairman of said Committee having deemed such hearing desirable, and therein began an inquiry and investigation regarding the campaign expenditures of the various candidates who were then or theretofore had been candidates for the office of United States Senator of Nebraska, and for the Republican nomination to said office as heretofore set forth.

That by force and authority of the Resolution aforesaid, said Special Committee on Senatorial Campaign Expenditures and the Subcommittee thereof, including said Sub-committee composed of the said Honorable Gerald P. Nye, Chairman, and Honorable Porter H. Dale, was empowered and directed to investigate the entire subject of campaign expenditures of or made in behalf of the various candidates for the United States Senate in the State of Nebraska and elsewhere, at the Primary and general elections held in said State of Nebraska and elsewhere, the names of the persons, firms, or corporations subscribing, the amount contributed, the method of expenditure of said sums, and all the facts in relation thereto not only as to the subscriptions of money and expenditure thereof but as to the use of any other means or influence including the promise or use of patronage and all other facts in relation thereto which would not only be of public interest, but which would aid the United States Senate in enacting any remedial legislation or to decide any contest which might be instituted involving the right to a seat in the said United States Senate.

6 And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That said Committee on Senatorial Campaign Expenditures, through said Sub-committee composed of said Honorable Gerald P. Nye and said Honorable Porter H. Dale, did in fact thereupon proceed in the State of Nebraska to exercise said authority conferred by said Resolution, and to make such investigation with a view to making such report, findings, and recommendations to the Senate on the matters and questions so referred to the said Committee, and then and there for that purpose did hold a hearing as above set forth at Lincoln, Lancaster county, Nebraska, and within the jurisdiction of this court, at which witnesses were examined and documents were

produced; that pursuant to authority of said Resolution, said Committee employed counsel and assistants to investigate matters in the State of Nebraska, and during the said hearing, the said Sub-committee directed inquiry to be made, and caused witnesses to be examined regarding campaign expenditures incident to the candidacy of the said several candidates for the office of United States Senator as aforesaid, and contributions made for or against the candidacy of the said candidates, and as to any money expended in that behalf by the witnesses called to testify at said hearing, and as to the activity of the said witnesses in the said Senatorial campaign, and the names of the persons, firms and corporations subscribing, the amount contributed to such campaign expenditures, and the method of such expenditures, and other facts relating thereto, and as to the use of other means indulged in the promotion of the candidacy of the said George W. Norris of Broken Bow, Nebraska, and the candidacy of one W. M. Stebbins of Gothenburg, Nebraska, and the candidacy of one George W. Norris of McCook, Nebraska, and in opposition to other candidates for the office of United States Senator before the Primary election as aforesaid, and other facts in relation thereto which would be of public interest, and which would aid the Senate of the United States in enacting remedial legislation, and in the deciding of any contests which might thereafter result incident to the election of a United States Senator in the State of Nebraska.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That on said twenty-second day of September, in the year nineteen hundred thirty, at Lincoln, in Lancaster county in the Lincoln Division of the District of Nebraska, Circuit aforesaid, and within the jurisdiction of this court, George W. Norris, late of Broken Bow, Nebraska, did appear in the United States Court Room of
7 the United States Court House and Post Office Building at Lincoln aforesaid, before a Sub-committee of the Special Committee on Campaign Expenditures of the United States Senate, as a witness, and did then and there take an oath before the Honorable Gerald P. Nye, United States Senator and a member and chairman of the said Special Committee on Campaign Expenditures as aforesaid, and a member of the Sub-committee conducting hearings at said time and place in the State of Nebraska, the said Gerald P. Nye having authority and jurisdiction under the laws of the United States of America, at said time and place to administer oaths to witnesses, that he, the said George W. Norris of Broken Bow, Nebraska, would testify truly in connection with the matters and questions then so under inquiry before the said Committee and Sub-committee, and that the said oath was duly administered to the said George W. Norris of Broken Bow, Nebraska, by the said Honorable Gerald P. Nye, who then and there was duly authorized by the Laws of the United States of America to administer said oath to said George W. Norris of Broken Bow, Nebraska, in that behalf.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present and say that thereupon it became and was material to said injury before the Committee aforesaid, whether the said George W. Norris of Broken Bow, Nebraska, had received any money from anyone in this campaign (the campaign for nomination of United States Senator at the Primary election to be held on the twelfth day of August, in the year nineteen hundred thirty, meaning), [and whether the Fifty Dollars which he, the said George W. Norris of Broken Bow, Nebraska, paid his filing fee with, being the Fifty Dollars paid to the County Treasurer of Custer County, Nebraska, on July 2, 1930, was his own money, and whether said Fifty Dollars with which said filing fee was paid to the County Treasurer of Custer County, Nebraska, was derived and obtained by him, the said George W. Norris of Broken Bow, Nebraska, from his wages in the store in which he was employed,] or whether he, the said George W. Norris of Broken Bow, Nebraska, had received any assurance from anyone of financial support and backing, or of help in financing his campaign as a candidate for the United States Senate, [and whether one Victor Seymour did not make avail-
8 able any money for his, the said George W. Norris' campaign for nomination for United States Senator at the Primary election to be held the twelfth day of August, in the year nineteen hundred thirty, or whether the said Victor Seymour had made available any money to be expended in said campaign in behalf of said George W. Norris of Broken Bow, Nebraska, and whether the campaign statement purporting to be issued by said George W. Norris of Broken Bow, Nebraska, and which statement was published in the Custer County Chief, a newspaper published at Broken Bow, Nebraska, on July 8, 1930, a copy of which is attached hereto marked Exhibit A, and to which reference is hereby made as if fully set forth herein, was written by the said George W. Norris of Broken Bow, Nebraska, and whether anyone helped the said George W. Norris of Broken Bow, Nebraska, to write or prepare said statement and whether said statement, copy of which is marked Exhibit A and attached hereto, was mailed by said George W. Norris of Broken Bow, Nebraska, to A. Paul Johnson at Broken Bow, Nebraska.]

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That the said George W. Norris of Broken Bow, Nebraska, in response to questions propounded to him by said Honorable Gerald P. Nye and Honorable Porter H. Dale, or one of them, and which said questions and each of the same asked by said Gerald P. Nye or Porter H. Dale were material to the matters then under inquiry by said Honorable Gerald P. Nye and the Sub-committee aforesaid and said Committee on Campaign Expenditures of the United States Senate, and each of them, said George W. Norris of Broken Bow,

The indictment as submitted by the trial court to the jury did not include the parts of the indictment included within the brackets.

Nebraska, having taken the oath as a witness aforesaid, to testify truly, then and there unlawfully and feloniously did wilfully, corruptly, falsely, and contrary to his said oath, testify to matters material to the questions then and there under inquiry, which he, the said George W. Norris of Broken Bow, Nebraska, did not believe to be true, in that he, the said George W. Norris of Broken Bow, Nebraska, did testify in substance and effect that he, the said George W. Norris of Broken Bow, Nebraska, had not received any money from anyone in this campaign (the campaign for nomination of United States Senator at the Primary election to be held the twelfth day of August, in the year nineteen hundred thirty, meaning), [and that the Fifty Dollars which he, the said George W. Norris of
9 Broken Bow, Nebraska, paid his filing fee with (the filing fee of Fifty Dollars paid to the County Treasurer of Custer County, Nebraska, on July 2, 1930, meaning), was his own money, and derived and obtained by him, the said George W. Norris of Broken Bow, Nebraska, from his wages in the store in which he was employed,] and that he, the said George W. Norris of Broken Bow, Nebraska, had received no assurance from anyone of financial support and backing, or of help in financing his campaign as a candidate for the United States Senate, [and that one Victor Seymour did not make available any money for his, the said George W. Norris', campaign for nomination for United States Senator at the Primary election to be held the twelfth day of August, in the year nineteen hundred thirty, or any money to be expended in said campaign in behalf of said George W. Norris of Broken Bow, Nebraska, and that the campaign statement purporting to be issued by said George W. Norris of Broken Bow, Nebraska, and which said statement was published in the Custer County Chief, a newspaper published at Broken Bow, Nebraska, on July 8, 1930, a copy of which is attached hereto marked Exhibit A, and to which reference is hereby made as fully as if set forth herein, was written by the said George W. Norris of Broken Bow, Nebraska, and that no one helped him to write or prepare said statement aforesaid, and that said statement was mailed by said George W. Norris of Broken Bow, Nebraska, to A. Paul Johnson at Broken Bow, Nebraska,] and which testimony aforesaid was material to the matters then and there under inquiry, whereas in truth and in fact the testimony so given by said George W. Norris as aforesaid, was false, as he, the said George W. Norris of Broken Bow, Nebraska, then and there well knew, in that he, the said George W. Norris of Broken Bow, Nebraska, had received from A. Paul Johnson, the sum of Fifty Dollars ($50.00), the exact description and denominations of which are to the grand jurors aforesaid, unknown, for use in paying to the County Treasurer of Custer County, Nebraska, his, the said George W. Norris', filing fee as a candidate for the office of United States Senator, [and which money the said George W. Norris of Broken Bow, Nebraska, knew had been delivered to said A. Paul Johnson by Victor Seymour:] and said

testimony was false as he, the said George W. Norris of Broken Bow, Nebraska, then and there well knew, in that said George W. Norris of Broken Bow, Nebraska, had received from A. Paul Johnson, a United States Government Bond in the sum of Five Hundred Dollars ($500.00), a more exact description of which is to the
10 grand jurors aforesaid, unknown, to enable him, the said George W. Norris of Broken Bow, Nebraska, to carry on a campaign for the United States Senate, and was delivered to him, the said George W. Norris of Broken Bow, Nebraska, because of his filing as a candidate for the United States Senate; and said testimony was false, as he, the said George W. Norris of Broken Bow, Nebraska, then and there well knew, in that said George W. Norris of Broken Bow, Nebraska, had received assurance communicated to him, the said George W. Norris of Broken Bow, Nebraska, through A. Paul Johnson, of financial backing in his campaign aforesaid; [and said testimony was false, as he the said George W. Norris of Broken Bow, Nebraska, then and there well knew, in that said campaign statement aforesaid was prepared by Victor Seymour and others to the grand jurors aforesaid unknown, and was not prepared by said George W. Norris of Broken Bow, Nebraska, and was mailed to A. Paul Johnson at Broken Bow, Nebraska, by said Victor Seymour of Lincoln, Nebraska.]

And so the grand jurors aforesaid, upon their oaths aforesaid, do present:

That he, the said George W. Norris of Broken Bow, Nebraska, heretofore, to-wit, on the said twenty-second day of September, in the year nineteen hundred thirty, and at and in the City of Lincoln, Lancaster County, in the Lincoln Division of the District of Nebraska, Circuit aforesaid, and within the jurisdiction of this court, having taken an oath as aforesaid, before a competent tribunal, officer, and person, in a case and matter in which a Law of the United States of America authorized an oath to be administered, that he, the said George W. Norris of Broken Bow, Nebraska, would testify truly, then and there unlawfully and feloniously did wilfully, falsely, corruptly, and contrary to such oath, testify to material matters as aforesaid, which he then and there did not believe to be true, and which he then and there knew to be false, and which then and there were false, as aforesaid, and thereby in the manner and form aforesaid, then and there became and was guilty of wilful and corrupt perjury, contrary to the form of statute in such case made and provided, and against the peace and dignity of the said United States of America.

CHARLES E. SANDALL,
United States Attorney.
By ROBERT VAN PELT,
Assistant United States Attorney.

11 (Endorsed On Back Of Indictment:) No. 1557 Crim. United States District Court, District Of Nebraska, Lincoln Division—The United States Of America vs. George W. Norris of Broken

Bow, Nebraska—Indictment—Perjury—A true bill, E. P. Dunlap, Foreman—Presented in open court by the Grand Jury and Filed June 23, 1931. R. C. Hoyt, Clerk, J. B. Nickerson, Deputy; Filed in Lincoln Division Jun. 23, 1931, R. C. Hoyt, Clerk, by J. B. Nickerson, by J. B. Nickerson, Deputy.

In United States District Court

Demurrer of defendant to indictment

Filed August 13, 1931

The defendant, George W. Norris, demurs to the indictment herein and to each of the two counts thereof, for the following reasons, to-wit:

1. That the testimony, which the indictment alleges to have been given by the defendant, was not given in any case in which a law of the United States authorized an oath to be administered.

2. The statements contained in the said indictment and in each of the counts thereof, are insufficient to constitute any crime or offense under the laws of the United States.

3. The resolution adopted by the Senate of the United States as set forth in said indictment purports to grant to the Senate Committee therein named powers in excess of those which could be so granted to such committee under the provisions of the Constitution of the United States and particularly the provisions of Section 4, Article 1, of said Constitution, relating to the control of the election of United States Senators.

4. The adoption of the resolution by the Senate of the United States and the inquiry purported to have been conducted in pursuance thereof, as set forth in said indictment, constitutes an usurpation of power reserved by the Constitution to the several states.

5. The resolution adopted by the United States Senate, as set forth in said indictment, does not empower the committee authorized to be appointed thereunder to make any investigation of the matters therein enumerated prior to the holding of the senatorial primaries in Nebraska on August 13, 1930.

6. Senators Gerald P. Nye and Porter H. Dale were wholly
12 without jurisdiction, right, or authority to administer an oath to this defendant, or to ask questions of him or to inquire of this defendant pertaining to any of the matters set forth in the indictment.

7. The inquiry so conducted by the said Gerald P. Nye and Porter H. Dale as set forth in the indictment was unauthorized and illegal.

8. The statements which it is alleged this defendant testified to in the indictment are immaterial and redundant matters and not sufficient to constitute any crime or offense under the provisions of any laws of the United States.

9. The statements as alleged in said indictment are wholly immaterial as a basis of any charge of perjury against this defendant.

10. The questions asked by the said Senators Gerald P. Nye and Porter H. Dale and which elicited the answers purported to be set forth in the said indictments, were not questions, and the said answers were not answers, pertinent to any inquiry authorized by said resolution or by any authority or power confered upon said Senators Gerald P. Nye and Porter H. Dale.

11. The inquiry conducted by Senators Gerald P. Nye and Porter H. Dale which elicited the statements alleged to have been made by this defendant in said indictment, insofar as they related to matters in connection with the senatorial primary in Nebraska for 1930, was an illegal inquiry.

12. The inquiries propounded to this defendant and the answers elicited from him by said inquiries, pertaining to a campaign statement published in the Custer County Chief, a newspaper published at Broken Bow, Nebraska, and in regard to the same being written by this defendant without the help of any other person and with reference to the transmission of the same through the mail and with reference to any assurance communicated to this defendant in regard to financial backing of any campaign by him, and with references to contributions to any senatorial campaign by defendant, were all wholly irrelevant, immaterial, and redundant matters and concerning which it was not within the power of any Committee of the United States Senate or of Senators Gerald P. Nye and Porer H. Dale to make inquiry.

13. The matters alleged in the indictment to have been testified to by this defendant in the second count of said indictment are matters wholly immaterial, redundant and irrelevant to any inquiries which said Senate Committee or Senators Gerald P. Nye or Porter H. Dale might make, and were also matters beyond the power or right or authority of any such Committee or of said Senators to inquire into.

GEORGE W. NORRIS,
Defendant.

By WM. E. SHUMAN,
His Attorney.

In United States District Court

Order overruling demurrer to indictment

Entered December 23, 1931

It is here ordered, That defendant's demurrer to the first Count of the Indictment presented against him, heretofore submitted, be, and the same is here overruled, to which ruling of the Court, defendant excepts.

In United States District Court

Arraignment and plea of not guilty; jury empaneled; Trial, December 9, 1935

Entered December 9, 1935

The defendant George W. Norris, appears at the bar of this Court, personally, and with his attorneys, William E. Shuman and Bert L. Overcash of North Platte, Nebraska, and waives the reading of the Indictment presented by the Grand Jury and filed herein against him on the 23d day of June 1931, charging him with Perjury, stating that he knows the nature of the charge against him, and enters his plea of Not Guilty thereto.

Thereupon, the cause comes on regularly for trial, the plaintiff United States of America, appearing by its attorneys Joseph Votava, United States Attorney for the District of Nebraska, and Barlow Nye, Assistant United States Attorney for said District, and the defendant George W. Norris appearing by his attorneys, the said William E. Shuman and Bert L. Overcash; and it appearing that the regular panel of jurors has been exhausted, the Court orders the Marshal to summon talesmen, and one talesman, Charles E. Booth, is sworn in, and the following persons are duly empaneled and sworn to try said cause, that is to say: J. W. Hudson, John Litty, Fred Kerl, William Reichert, Wiley Sandusky, W. D. Potter, Fred W. Bontz, Theo. Damme, Chas. E. Booth, Milo Bowen, Ross Brown, Richard Fuerst.

14 Opening statements are made by the respective counsel, and testimony is adduced in part. At the hour of five o'clock P. M., the trial not being concluded, further proceedings herein are continued until 9:30 A. M., on Tuesday, December 10, 1935.

In United States District Court

Trial, December 10, 1935

Entered December 10, 1935

On this day again come the parties herein, by their respective counsel, also come the jury heretofore empaneled and sworn to try said cause, and the trial proceeds. Further testimony is adduced, and at the hour of five o'clock P. M., the trial not being concluded, further proceedings herein are continued until 9:30 A. M., on Wednesday, December 11, 1935.

In United States District Court

Trial, December 11, 1935

Entered December 11, 1935

On this day again come the parties herein, by their respective counsel, also come the jury heretofore empaneled and sworn, and the trial proceeds. Further testimony is adduced, and thereupon, plaintiff and defendant rest.

The hour of adjournment having arrived, further proceedings herein are continued until 9:30 A. M., on Thursday, December 12, 1935.

In United States District Court

Trial, December 12, 1935; verdict

Entered December 12, 1935

On this day again comes the parties herein, by their respective counsel, also come the jury heretofore empaneled and sworn to try said cause. The jury hears the arguments of the respective counsel, receives the instructions of the Court, and at the hour of two o'clock and thirty minutes past noon, retires to deliberate.

Afterwards, on this same day, the jury comes into Court at the hour of ten o'clock and fifteen minutes past noon, and by their foreman, and in their presence, returns its verdict in words and figures following, to-wit:

15 "Verdict

"District Court of the United States for the District of Nebraska, Lincoln Division

"No. 1557—Criminal

"UNITED STATES OF AMERICA

"*vs.*

"GEORGE W. NORRIS

"Verdict

"We, the jury, duly empaneled and sworn to try the issues joined in the above entitled cause do find the said defendant, George W. Norris, Guilty in manner and form as charged in the indictment therein.

FRED H. KERL, *Foreman.*"

Thereupon the jury is discharged from further service in the matter and the case is passed until January 2, 1936, for sentence and other proceedings.

In United States District Court

Motion for new trial

Filed December 13, 1935

The defendant, George W. Norris, moves the court for an order setting aside the verdict and granting a new trial in the above entitled action, for the following reasons, to-wit:

1. The court erred in overruling the motion of the defendant to quash the indictment.

2. The court erred in overruling the plea in abatement of the defendant.

3. The court erred in overruling the demurrer of the defendant.

4. The court erred in overruling the motion of the defendant at the conclusion of the evidence for the Government to direct a verdict for the defendant.

5. The court erred in overruling the motion of the defendant made at the conclusion of all the evidence to direct a verdict for the defendant.

6. The court erred in submitting to the jury Count One of the indictment for the reasons that:

(a) The matters and things therein stated are insufficient to charge a crime or offense under the laws of the United States.

16 (b) The proof adduced by the prosecution was insufficient to establish beyond a reasonable doubt that the defendant's answer to the questions referred to in the indictment were false and in any way constituted the crime of perjury.

(c) That the said matters referred to in the said indictment and the answers of the defendant to the questions offered to sustain the said charges in the indictment were foreign, irrelevant, immaterial to, and beyond the scope and power of the investigation in which said evidence was elicited.

7. The court erred in the overruling of objections to the admission in evidence of the testimony of A. Paul Johnson, pertaining to any conversations and transactions between said witness and the defendant for the reason that the said A. Paul Johnson was the attorney for the defendant, the communications were confidential and the defendant did not waive the privileged character of said communications.

8. The court erred in denying to the defendant the right to prove that after he had first given his testimony before the said Senate Committee, he inquired of his attorney if he could and should return to the witness stand and correct his testimony and that said defendant was advised that he could and should so return to the stand and correct his testimony, and that he acted upon the advice of said attorney but was not permitted to show these facts in evidence.

9. The court erred in rejecting the evidence offered by the defendant to the effect that the chairman of said sub-committee, Senator

Gerald P. Nye, when the defendant had been asked and answered the last question put to him, stated to the defendant "The Chair is prepared to announce it does not care to hear any more testimony from Mr. Norris."

10. The court erred in refusing to permit the defendant to testify that he was ready and willing to testify before said Senate Committee and to correct any and all errors or omissions in any of his former evidence.

11. The court erred in refusing to give to the jury instruction number 1 tendered by the defendant.

12. The court erred in refusing to give to the jury instruction number 2 tendered by the defendant.

13. The court erred in refusing to give to the jury instruction number 3 tendered by the defendant.

17 14. The court erred in refusing to give to the jury instruction number 4 tendered by the defendant.

15. The court erred in refusing to give to the jury instruction number 5 tendered by the defendant.

16. The court erred in refusing to give to the jury instruction number 6 tendered by the defendant.

17. The court erred in submitting to the jury that portion of the indictment wherein it was charged the defendant falsely testified that he had received no assurance from anyone of financial support and backing or of help in financing his campaign as a candidate for the United States Senate, for the reason that there was only one witness who testified to any facts to sustain this allegation of the indictment and there was no other evidence to corroborate in any way the testimony of said witness, and said witness being A. Paul Johnson.

18. The court erred in refusing to permit the defendant to show by the evidence that the defendant at the hearing of said Senate Committee and while the matter was yet pending before it and before any action was taken by said Senate Committee, corrected and offered to correct all former testimony given by said defendant before said Senate Committee.

19. The verdict of the jury is contrary to the evidence.

20. The verdict of the jury is contrary to the law.

WM. E. SHUMAN,
BERT L. OVERCASH,
Attorneys for Defendant.

In United States District Court

Order overruling motion for new trial; judgment

Entered January 2, 1936

The defendant George W. Norris, appears at the bar of this Court, personally, and with his counsel, William E. Shuman, he having

heretofore, on the 12th day of December, 1935, been convicted of the crime of Perjury as charged in an Indictment presented by the Grand Jury and filed herein against him on the 23d day of June, 1931, and having filed his Motion for New Trial, said motion is submitted, and, by the Court, overruled, to which ruling, exception is allowed to the defendant, George W. Norris.

And said defendant, George W. Norris, being asked whether
18 he has any legal reason why sentence and judgment should not be pronounced against him, and he being heard in that behalf, and no cause being shown, it is by the Court

Considered, ordered, and adjudged, That said defendant George W. Norris, be, and he is hereby, sentenced to pay a fine of One Hundred ($100.00) Dollars, and be imprisoned in jail for a period of three months.

In United States District Court

Notice of appeal

Filed January 2, 1936

The name and address of appellant is George W. Norris, Alva, Oklahoma.

1. The names and addresses of appellant's attorneys are Wm. E. Shuman and Bert L. Overcash, North Platte, Nebraska.

2. The offense charged is perjury.

3. The date of the judgment is January 2, 1936.

4. A brief description of the judgment or sentence is that defendant was sentenced to imprisonment for three months and to pay a fine of $100.00.

5. The name of the prison where defendant is now confined, if not on bail, is _____ Defendant has been admitted to bail.

I, the above named appellant, hereby appeal to the United States Circuit Court of Appeals for the Eight Circuit, from the judgment above mentioned on the grounds set forth below.

Dated at Lincoln, Nebraska, January 2, 1936.

GEORGE W. NORRIS,
Appellant.

Grounds of appeal

(a) The Court erred in overruling the motion of the defendant to quash the indictment.

(b) The Court erred in overruling the plea in abatement.

(c) The Court erred in overruling the demurrer of the defendant.

(d) The Court erred in overruling the motion of the defendant to direct a verdict at the conclusion of the evidence
19 for the Government and also at the conclusion of all of the evidence offered in the case.

(e) The Court erred in submitting to the jury Count One of the indictment.

(f) The Court erred in overruling objections to the admission of evidence of the testimony of A. Paul Johnson pertaining to conversation and transactions between said witness and the defendant for the reason that the said A. Paul Johnson was the attorney for the defendant and the communications were confidential.

(g) The Court erred in denying the defendant the right to prove, after he had given his first testimony before the Senate Sub-Committee, that he inquired of his attorney if he could return to the witness stand and correct his testimony, and that he was advised by said attorney that he could and should return to the stand and correct his testimony.

(h) The Court erred in not receiving the evidence offered by the defendant that the chairman of said sub-committee, Senator Gerald P. Nye, after the defendant had given his evidence, stated to said defendant, "The Chair is prepared to announce it does not care to hear any more testimony from Mr. Norris."

(i) The Court erred in refusing to give to the jury instructions numbered 1, 2, 3, 4, 5, and 6, tendered by the defendant.

(j) The verdict of the jury is contrary to the evidence.

(k) The verdict of the jury is contrary to the law.

WM. E. SHUMAN,
Attorney for Defendant.

JAN. 2, 1936.

Received copy of the within Notice this date.

BARLOW NYE,
Ass't U. S. Attorney.

Duplicate notice of appeal filed in Appellate Court

Memorandum of Clerk of U. S. Circuit Court of Appeals:
The duplicate copy of the Notice of Appeal and Grounds thereof were filed in the Clerk's Office of the U. S. Circuit Court of Appeals on January 3, 1936, and are omitted from this printed record to avoid duplication. The case was docketed in the United States Circuit Court of Appeals for the Eighth Circuit on January 8, 1936.

20 In United States District Court

Order granting time to file bill of exceptions and assignment of errors, etc.

Filed and entered January 2, 1936

A notice of appeal having been filed by the defendant George W. Norris in this case and notice thereof having been given to the court and a bond to cover bail and costs on the appeal having been furnished by the defendant, and the parties having appeared before the court for such directions as to the preparation of the record on

appeal as may be appropriate, it is ordered that the appellant shall within 90 days from this date prepare and present for settlement to the judge of this court his proposed bill of exceptions, and that the appellant shall thereafter file with the clerk of this court the bill of exceptions within 2 days after such bill of exceptions is finally settled and allowed, and that the appellant shall file with the clerk of this court an assignment of errors of which the appellant complains, on or before the time when the allowed bill of exceptions is filed with the clerk. When the proposed bill of exceptions is presented to the judge for settlement, an order will be made fixing a time within which proposed amendments or objections thereto may be made and a further order will be made fixing a time for a hearing as to any objections or amendments, before the final settlement and allowance of the bill of exceptions. The bill of exceptions shall conform to the provisions of Rule 8 of the Supreme Court of the United States which reads as follows:

"The judges of the district courts in allowing bills of exception shall give effect to the following rules:

"1. No bill of exceptions shall be allowed on a general exception to the charge of the court to the jury in trials at common law. The party excepting shall be required before the jury retires to state distinctly the several matters of law in such charge to which he excepts; and no other exceptions to the charge shall be allowed by the court or inserted in a bill of exceptions.

"2. Only so much of the evidence shall be embraced in a bill of exceptions as may be necessary to present clearly the questions of law involved in the rulings to which exceptions are reserved, and such evidence as is embraced therein shall be set forth in condensed and narrative form, save as a proper understanding of the questions presented may require that parts of it be set forth otherwise."

Dated: Jany. 2, 1936.

THOS. C. MUNGER, *Judge.*

21 See Supreme Court rules as to proceedings in criminal cases after verdict Nos. III, VI, VII, VIII, IX, XIII, United States Circuit Court of Appeals Rules for the 8th Circuit Nos. 10, 35, 36, 37.

[Bond on appeal for $1,500.00 approved and filed Jan. 2, 1936, omitted in printing.]

22 In United States District Court

Assignment of errors

Filed March 10, 1936

The defendant herein, George W. Norris, herewith files the following Assignment of Errors, upon which he will rely in his prosecution of the appeal in the above entitled cause, from the orders, rulings,

verdict, and judgment made by the District Court of the United States for the District of Nebraska, Lincoln Division, in said case.

1. The Court erred in overruling the demurrer of the defendant.

23 2. The Court erred in overruling the motion of the defendant at the conclusion of the evidence for the Government to direct a verdict for the defendant.

3. The Court erred in overruling the motion of the defendant made at the conclusion of all the evidence to direct a verdict for the defendant.

4. The verdict of the jury is contrary to the evidence.

5. The verdict of the jury is contrary to the law.

6. The Court erred in rejecting that portion of the evidence of the witness William M. Day, wherein said witness testified that Senator Nye, the Chairman of the Sub-committee of the United States Senate, before which committee the defendant herein was a witness, stated to the witness after he had answered the last question which they would permit him to answer, that

"The Chair is prepared to announce it does not care to hear any more testimony from Mr. Norris."

To this offer objections, ruiings thereon by the Court, and exceptions were as follows:

"Mr. Votova. The government objects to the offer of same as incompetent and immaterial, not tending to prove or proving any defense to the charges in the indictment, asking for a conclusion, and in support of the objection we refer to the record made to the first offer of Exhibit 10 as contained on pages 301 and 305.

"The Court. I will reserve ruling on that."

Later defendant re-offered this same evidence, to which plaintiff objected as follows:

"Mr. Votova. Objected to as incompetent and immaterial, not tending to disprove any of the charges in the indictment and hearsay and self-serving.

"The Court. I think it is immaterial.

"To which ruling of the court the defendant then and there duly excepted.

"Mr. Shuman. We offer to prove by the witness on the stand that the Senator Nye presiding as Chairman on this occasion at the time stated made the statement, 'And the Chair is prepared to announce that it does not care to hear any more testimony from Mr. Norris.'

"Mr. Votova. We object to the offer for the same reason.

24 "The Court. Sustained.

"To which ruling of the court the defendant then and there duly excepted."

7. The Court erred in refusing to permit the defendant to answer the question noted below in this paragraph and in rejecting the offer of the defendant to prove the said matter, all of which pertained to evidence which had been given by the defendant before the said Senate Sub-Committee, and the question and answer referred to, the

offer to prove the objections thereto, the ruling of the Court and the exceptions thereto are as follows:

"Q. After you had taken counsel with me and I had advised you in regard to the subject of whether you could go back and correct your testimony, I will ask you to state whether or not you were ready and willing to answer any question that they might ask you correctly and fully when you returned to the witness stand?

"Mr. VOTOVA. Objected to as incompetent and immaterial.

"The COURT. Sustained.

"To which ruling of the court the defendant then and there duly excepted.

"Mr. SHUMAN. Did your Honor have some other rulings in reserve?

* * * * * * *

"The COURT. Yes, there was one that is not covered. You offered to show that the defendant was ready and willing to make any and all changes in his testimony. I will sustain the objection as to that.

"To which ruling of the court the defendant then and there duly excepted."

8. The Court erred in refusing to give to the Jury instruction number one tendered by the defendant.

9. The Court erred in refusing to give to the Jury instruction number two tendered by the defendant.

10. The Court erred in refusing to give to the Jury instruction number three tendered by the defendant.

11. The Court erred in refusing to give to the Jury instruction number four tendered by the defendant.

12. The Court erred in refusing to give to the Jury instruction number five tendered by the defendant.

25 13. The Court erred in refusing to give to the Jury instruction number six tendered by the defendant.

14. The Court erred in submitting to the Jury, after it had retired to deliberate upon its verdict, the indictment herein, in the form in which the Court did submit the same to the Jury and which contained a submission to the Jury of the question of whether or not the defendant committed perjury when he testified that

"he had not received any money from anyone in this campaign (the campaign for nomination of United States Senator) to the primary election to be held on the twelfth day of August, in the year Nineteen Hundred and Thirty."

15. The Court erred in submitting to the Jury, after it had retired to deliberate upon its verdict, the indictment herein, in the form in which the Court did submit the same to the Jury and which contained a submission to the Jury of the question of whether or not the defendant committed perjury when he testified that he

"had received no assurance from anyone of financial support and backing or of help in financing his campaign as a candidate for the United States Senate."

Wherefore the defendant prays that the verdict and judgment of the District Court herein be reversed and the defendant discharged.

GEORGE W. NORRIS,
Defendant.
By WM. E. SHUMAN,
BERT L. OVERCASH,
His Attorneys.

LINCOLN, NEBRASKA, *March 10, 1936.*

Received copy of the foregoing Assignment of Errors.

BARLOW NYE,
Assistant United States District Attorney.

26 In District Court of the United States for the District of Nebraska, Lincoln Division

No. 1557—Criminal

UNITED STATES OF AMERICA, PLAINTIFF

vs.

GEORGE W. NORRIS, DEFENDANT

Bill of exceptions

Be it remembered that on December 9, 1935, the above entitled case was called for trial in the above entitled court, Honorable Thomas C. Munger, Judge, presiding. Jury was empaneled and sworn, and the trial proceeded as follows:

Appearances: For plaintiff, Joseph T. Votava, United States District Attorney; Barlow Nye, Assistant United States District Attorney. For defendant, Wm. E. Shuman, Bert L. Overcash.

The plaintiff offers in evidence Exhibits 1, 2, 3, 4, 5, 6, and 7, all of which exhibits were in due and proper form and were received in evidence and they being as follows:

Exhibit 1 is a duly authenticated copy of Senate Resolution Number 215 agreed to by the Senate of the United States on April 10, 1930, same being in part as follows:

Plaintiff's Exhibit 1

"Resolved, That a special committee, consisting of five Senators, to be appointed by the Vice-President, is hereby authorized and directed to investigate the campaign expenditures of the various candidates for the United States Senate, the names of the persons, firms, or corporations subscribing, the amount contributed, the method of expenditure of said sums, and all facts in relation thereto, not only as to the subscriptions of money and expenditures thereof but as to the use of any other means or influence, including the promise or use of patronage, and all other facts in relation thereto which would

not only be of public interest but which would aid the Senate in enacting any remedial legislation or in deciding any contest which might be instituted involving the right to a seat in the United States Senate.

"The investigation hereby provided for, in all the respects above enumerated, shall apply to candidates and contests before Sena-
27 torial primaries, senatorial conventions, and the contests and campaign terminating in the general election in November 1930. * * *

"Said committee is hereby authorized to act upon its own initiative and upon such information as in its judgment may be reasonable or reliable. * * *

"Said committee is hereby authorized in the performance of its duties to sit at such times and places, either in the District of Columbia or elsewhere, as it deems necessary or proper. * * *

"Said committee is hereby specifically authorized to act through any sub-committee authorized to be appointed by said committee. The chairman of said committee or any member of any sub-committee may administer oaths to witnesses and sign subpoenas for witnesses; and every person duly summoned before said committee, or any sub-committee thereof, who refuses or fails to obey the process of said committee or who appears and refuses to answer questions pertinent to said investigation shall be punished as prescribed by law."

This resolution has been set forth in full in this transcript, as a part of the indictment, on pages 5 to 15. The certificate to Exhibit 1 also sets forth that:

"as shown by the official records of the Senate, the said committee was on April 17, 1930, composed of the following Senators, namely: Mr. Gerald P. Nye, of North Dakota; Mr. Porter H. Dale, of Vermont; Mr. C. C. Dill, of Washington; Mr. Roscoe C. Patterson, of Missouri; and Mr. Robert F. Wagner, of New York; and that said committee and said membership continued until the termination of said committee's existence by the terms of Senate Resolution 381, on Monday, January 3, 1932."

Exhibit 2 is a duly authenticated copy of extracts from the Senate Journal showing the appointment by the Vice President of the members of the committee and shows that the committee on April 17, 1930, was composed of the Senators named in the certificate, which is a part of Exhibit 1, same being as follows:

Plaintiff's Exhibit 2

Extract from Senate Journal, Calendar Day, Thursday, April 10 (Legislative Day, April 8), 1930, Page 269:

"The Vice President subsequently appointed Mr. Johnson, Mr. Goldsborough, Mr. Patterson, Mr. Pittman, and Mr. Wagner as the members of the foregoing committee."

28 Extracts from Senate Journal, Monday, April 14, 1930, page 274:

"The Vice President appointed Mr. Nye and Mr. Dill as members of the special committee created under Senate Resolution 215 to make investigation into the campaign expenditures of candidates for the United States Senate, vice Mr. Johnson and Mr. Pittman, respectively, excused."

Extract from Senate Journal, Wednesday, April 16 (Legislative Day, April 14), 1930, Page 282:

"The Vice President appointed Mr. Bingham as a member of the special committee, created under Senate Resolution No. 215, to make investigation into the campaign expenditures of candidates for the United States Senate, vice Mr. Goldsborough, excused.

"Mr. Bingham subsequently resigned as a member of the foregoing committee."

Extract from Senate Journal, Thursday, April 17, 1930, Page 285:

"The Vice-President appointed Mr. Dale as a member of the special committee, created under Senate Resolution 215, to make investigation into the campaign expenditures of candidates for the United States Senate, vice Mr. Bingham, resigned.

"Then comes the attestation of the Secretary of the Senate and the seal of the United States Senate."

Plaintiff's Exhibit 3

Exhibit 3 is a duly authenticated copy of the proclamation by the Governor of Nebraska issued on June 5, 1930, directing that a Primary Election be held in the several voting precincts throughout the State of Nebraska on August 12, 1930, for the purpose of nominating candidates by each political party for one United States Senator, for State Railway Commissioner, and other offices to be filled at the general election in November, 1930.

Plaintiff's Exhibit 4

Exhibit 4 is a duly authenticated copy of the application of George W. Norris of McCook, Nebraska, requesting that his name be placed upon the official primary ballot of the Republican party for
29 the primary election to be held on August 12, 1930, as a candidate for Senator of the United States for Nebraska, filed with the Secretary of State of the State of Nebraska on January 11, 1930, accompanied by a receipt showing that the said George W. Norris had duly paid the filing fee required by law, with copy of the receipt of the County Treasurer of Red Willow County, Nebraska, for the filing fee for said office.

Plaintiff's Exhibit 5

Exhibit 5 is a duly authenticated copy of the application of George W. Norris of Broken Bow, Nebraska, requesting that his name be

placed upon the official primary ballot of the Republican party for the primary election to be held on August 12, 1930, as a candidate for Senator of the United States for Nebraska, filed with the Secretary of State of the State of Nebraska, on July 5, 1930, accompanied by a receipt showing that the said George W. Norris had duly paid the filing fee required by law, with copy of the receipt of the County Treasurer of Custer County, Nebraska, for the filing fee for said office.

Plaintiff's Exhibit 6

Exhibit 6 is a duly authenticated copy of petitions filed by thousands of voters of the State of Nebraska requesting that the name of W. M. Stebbins be placed upon the official primary ballot for the primary election to be held on August 12, 1930, as a candidate for the republican nomination for United States Senator for Nebraska, together with the receipt of the County Treasurer of Dawson County, Nebraska, for the filing fee for said office.

Plaintiff's Exhibit 7

Exhibit 7 is a duly authenticated copy of a paper called an application for nomination signed by W. M. Stebbins, and filed with the Secretary of State of the State of Nebraska, on November 12, 1929, accepting the nominating petitions shown by Exhibit Number 6, filed for the purpose of placing his name upon the official ballot of the Republican party for the Primary Election to be held on the 12th day of August 1930, in Nebraska, as a candidate for the office of United States Senator.

30 JOHN ANDREWS, called as a witness by plaintiff, testified as follows:

Direct examination by Mr. NYE:

Witness states that he has resided at St. Paul, Minnesota, since 1924; that he was at Washington, D. C., from April 1930 to April 1932; employed as Secretary to the Senate Committee on Campaign Expenditures and that he was appointed to that position in April 1930 by the committee. He accepted the appointment and was employed about two years. He produced Exhibit 8, which is the Minutes of a meeting of the Committee, which was known as the Select Committee on Senatorial Campaign Expenditures. It was his duty to handle all correspondence, arrange transportation, look after the details of the Committee, and keep a record of the meetings when so ordered.

Exhibit 8, being Exhibits 8-A, B, C, and D were identified by the witness and offered and received in evidence. These exhibits are Minutes kept by the Secretary, as Secretary to the Committee. Exhibit 8-A recites the minutes of a Meeting held in Washington, D. C., on May 18, 1930, and is in part as follows:

Exhibit 8–A

"A discussion of future procedure was had. The Chairman was unanimously authorized to act as a sub-committee and to appoint a sub-committee of one or more members to hold hearings as in his judgment was desirable."

Exhibit 8–B recites the minutes of a meeting held at Broken Bow, Nebraska, on July 19, 1930, and lists the names of the witnesses who gave evidence on that day, and is in part as follows:

Exhibit 8–B

"The Committee met, pursuant to the call of the Chairman (Mr. Nye), at 10:00 a. m. in the City Hall, Broken Bow, Nebraska. Senators Present: Nye, Chairman. * * * At 5:30 P. M. the Committee adjourned to meet subject to the call of the Chairman."

Exhibit 8–C recites the minutes of a meeting held by the Committee on July 21, 1930, at 10 A. M. in the Federal Building of Lincoln, Nebraska, and is in part as follows:

Exhibit 8–C

"The Committee met, pursuant to the call of the Chairman (Mr. Nye), at 10:00 a. m. in the Federal Building, Lincoln, Nebraska. Senators Present: Nye, Chairman. * * * At 5:10 p. m. the Committee adjourned to meet subject to the call of the Chairman."

Exhibit 8–D

Exhibit 8–D recites the minutes of a meeting of the Committee held on September 22, 1930, at 9:30 A. M. in the Federal Building in Lincoln, Nebraska. It further recites that at 12:15 P. M. the Committee adjourned to meet subject to the call of the Chairman.

Witness was present in Lincoln on September 22, 1930, at the meeting of the Committee. On that day public hearings were held in this Court room in the Federal Building in Lincoln. The meeting held on September 22 lasted throughout the day and then recessed until the next day until the hearings were completed. Public hearings were held on the 23rd and the 24th, at which the witness was present. The witness saw the defendant, George W. Norris, on either September 23 or 24, one of the days of the public hearings. The witness was in and out of the room but was not present when the defendant was called to the witness stand. The witness kept no other minutes of the meetings except as shown by Exhibits 8–A to D because this Committee had made the rule that when the shorthand reporter took over the meetings, he made all notices and notes of recesses, adjournments, etc. This shorthand reporter was William M. Day.

Cross-examination by WM. E. SHUMAN:

The minutes were kept either by the witness or court reporter. The Committee was in session in Lincoln on September 22, 23, and 24. It was a sub-committee appointed by a whole committee. The defendant testified one day and then again on the next day. The members of the Sub-committee who conducted this hearing were Senators Gerald P. Nye and Dale. The Committee held hearings, examined witnesses, and issued subpœnas.

"Q. So far as you know the committee just took the testimony of witnesses and it issued subpœnas to compel the attendance of such witnesses?

"A. That is correct."

The Committee was engaged in taking testimony in this court room practically the whole of the days of September 22, 23, and 24. The minutes produced, Exhibits 8-A to D are the only minutes made by the witness for these three days.

32 WILLIAM M. DAY, called as a witness by plaintiff, testified as follows:

Direct examination by Mr NYE:

Witness has resided at Washington, D. C. since 1910; is now employed as manager of the office of the official stenographers to Committees of the House of Representatives; his profession is shorthand reporting. In 1930 witness was engaged in reporting the hearings of the Senatorial Campaign Investigating Committee, which is the same committee that the witness John Andrews was telling about. Witness came to Lincoln and was here on September 22, 23, and 24, 1930. There were hearings before the committee on those days in this court room. Witness took the testimony of witnesses at the hearing in shorthand and transcribed same to longhand and has checked the printed form of the testimony with his shorthand notes. The printed form truly and correctly reflects the notes taken at this hearing. The notes also show the hours the committee met.

The witness first saw the defendant George W. Norris on September 22, 1930 in this court room. He was called as a witness before this committee. The members of the committee that were present were Senators Gerald P. Nye and Porter H. Dale. The defendant was called and sworn as a witness. He was asked his full name and answered George W. Norris. He gave his residence at that time as Enid, Oklahoma; said he took employment there about thirty days ago; was last employed before going to Enid at Broken Bow and that this employment at Broken Bow ended at the time of his filing; that he resigned from his position as manager of the grocery store at the time of his filing.

The witness testified that the defendant Norris testified that he first gave consideration to becoming a candidate for office about the

middle of May, he guessed; that he consulted with no one in May relative to becoming a candiate and that his consideration of being a candidate was on his own volition; that he was then considering becoming a candidate for railway commissioner and paid his filing fee but did not file for the office. Norris testified he did not file for railway commissioner because he thought about filing for United States Senator. He went to the office of attorney A. Paul Johnson, had the application paper prepared as a candidate for United States Senator, went to the court house and paid his filing fee, and then sent the application to Lincoln by registered mail.

33 At 12:00 o'clock noon the Committee recessed until 2:00 P. M. and resumed the hearing at that hour. The following are questions and answers, which are part of the examination of the defendant Norris:

"Q. Now what assurance did you have of financial support and backing?

"A. None whatever.

"Q. In your campaign?

"A. None whatever.

* * * * * * *

"Q. Did you get any assurance from anybody that they would help you—Republican, Democrat, independents, or anybody say they would help to finance your campaign?

"A. No, sir.

* * * * * * *

"Q. Did you receive any money from anybody in the campaign?

"A. I did not."

The notes kept by the witness show the sub-committee met pursuant to call at 10:00 A. M. in the Federal Building, Lincoln, Nebraska, on September 22, 1930. The questions and answers that have been copied above were all answered on that same day before the sub-committee. The questions were asked by members of the sub-committee and were answered by the defendant Norris.

Cross-examined by Mr. SHUMAN:

This was a meeting of the sub-committee, the Committee itself not being present. The session began in this room on the morning of September 22, 1930. The Committee remained in session all that day outside of a recess at the noon hour. The evidence which was given by Mr. Norris was given on September 22. Witness was present at all of the hearings and reported all of them. When the sub-committee finished taking testimony on the evening of September 22 they adjourned at 4:40 P. M. until 10:00 A. M. of September 23, 1930.

The evidence which the witness gave as to the testimony of the defendant Norris was only a portion of the evidence of the defendant and many other questions were asked of him and answered by him.

The defendant Norris was recalled to the witness stand the next day, September 23, 1930.

34 The defendant Norris was a witness before this Senate Committee on September 22, 1930, and again on the next day. He was questioned by Senator Nye on this second day.

A. PAUL JOHNSON, called as a witness by plaintiff, testified as follows:

Direct examination by Mr. NYE:

The witness stated that his name was A. Paul Johnson; that he resided at Broken Bow, Nebraska, where he had lived all his life of 37 years; that this occupation was lawyer, which was his profession in 1930. Witness said he first became acquainted with Mr. Victor Seymour of Lincoln, Nebraska, on Sunday, June 29 in Kearney, Nebraska, at the Ft. Kearney Hotel; that he was acquainted with Mr. Hugh Drake, formerly of Kearney, now a member of the railway commission; and with his brother Oscar Drake, also an attorney, of Kearney, Nebraska, and was acquainted too, with George W. Norris of Broken Bow, during the year 1930, who was manager of the Safeway Store at Broken Bow and had been for quite a while.

When the witness met Seymour in the Ft. Kearney Hotel, Hugh Drake and Oscar Drake were present, in a room of the hotel. Oscar Drake called him there by phone and the four of them conversed in that room. No one else was present.

The first meeting of the four of them in the room of the hotel was in the morning and they later met in the same room late in the afternoon. Mr. Seymour gave the witness $50.00 in currency and told him what to do with it.

The next day the witness returned to Broken Bow and saw the defendant Norris in his office, had a talk with him there in regard to the transactions that were had at Kearney with Victor Seymour and Oscar Drake and Hugh Drake.

On June 26, 1930, the defendant Norris came to the office of the witness with a blank application to have filled out as a candidate for Railway Commissioner and it was prepared in the office of the witness and was filed by the defendant and acknowledged by the witness as a notary public. It was then delivered to Mr. Norris. Mr. Norris returned to the office of the witness sometime on June 29, 1930. On Monday, June 30, 1930, the defendant was at the office of the witness and they had a conversation together, no one else being present. At that time the witness told defendant about the

35 conversation on the day prior with Seymour and the two Drakes in the Ft. Kearney Hotel. The witness told Mr. Norris that Mr. Seymour had requested the witness to tell him of his offer and request (Norris) not to file as a candidate for Railway Commissioner, but to file for the United States Senate; that Sey-

mour had given the witness $50.00 in currency to pay his filing fee if Norris should decide to accept Mr. Seymour's offer, and that Mr. Seymour stated if he would file the Republican party would support him; that this $50.00 would be given to him if he would accept the offer and file as a candidate for the United States Senate. The witness also said that he told Mr. Norris that Mr. Seymour stated he was prominent in the Republican party nationally. Nothing was done with this $50.00 on June 30, 1930, but on July 2, 1930, witness stated that he delivered the identical $50.00 to Norris. Witness also told the defendant that Mr. Seymour said that the Republican party would be behind him; that his campaign expenses would be paid estimated at $500.00; that he would be taken care of, and if he did not withdraw within the period that the law required, he would be delivered another $500.00.

Subsequent to June 30 the witness said he has received a $500.00 bond and on July 3 he delivered this bond to Mr. Norris at his residence in Broken Bow; that he had a conversation on that same day at the landing field about two miles east of Broken Bow, with Mr. Norris. Norris said he wanted this bond and that he had filed or was going to file. The witness said he told him the bond was in the bank and he would have to get it and that the witness would bring it to Norris at his home. Witness said he got the bond and delivered it to Mr. Norris at his residence.

Cross-examination by Mr. SHUMAN:

Witness has been practicing law for 14 years. Norris told the witness that his employers "had told him if he was going to file as a candidate for the United States Senate they didn't want him around the store; it would cause too much confusion; he was going on his vacation and he wanted $500.00 bond."

At the time the witness delivered the bond he also gave Norris $50.00 in money. Prior to that witness had given to Norris the $50.00 which witness had received from Seymour, the second $50.00 belonging to the witness.

The witness said he got the $500.00 bond in the mail on the morning of July 2, 1930, in a registered envelope and then he put it
36 in the bank. He came to the room in the Ft. Kearney Hotel the last Sunday of June to attend the conference, upon a telephone call from Oscar Drake. The candidacy of Mr. Norris was discussed at that meeting. The witness had a part in that discussion. The same persons were present both in the morning and afternoon conference that Sunday in the Kearney Hotel, they being Oscar Drake, Hugh Drake, Victor Seymour, and the witness. At this conference Mr. Seymour

"stated if Mr. Norris would file as a candidate for the United States Senate that his filing fees in the sum of $50.00 would be paid; that he would receive the support of the Republican Party; that his campaign expenses would be paid and it was estimated at $500.00; that he would be taken care of, and if he did not—that if he would file

and did not withdraw before the time limit for filing withdrawals that he would receive another $500.00.

"Q. That is, he was to receive a total of $1,000.00 if he filed and stayed on the ballot without withdrawing?

"A. Yes, sir."

The witness said also that he believed Mr. Seymour made a statement at that conference in regard to keeping his name out of it and seeing that it was not disclosed in the transaction. Seymour said he had a prominent place in the Republican party and did not want to be mixed up—did not want his name to be disclosed and that the witness was not to disclose his name at all in connection with these negotiations; that the witness told Seymour his name would not be disclosed to others but he did not believe it; he said it wouldn't be disclosed to Norris.

Witness also said that he might have told Norris that the man who gave the money to him was a man prominent in the Republican party of the state but that he could not disclose the name; that he couldn't say whether or not he did disclose the name to Norris and did not know whether he told him where this man lived.

The witness said he had never met Victor Seymour before that Sunday and that Seymour did make a statement that under no circumstances was his name to be disclosed as the one who gave the $50.00, or to anyone in connection with the transaction; that he did not want his name disclosed at all because of his connection with the Republican party.

"Q. And you did not disclose his name to Mr. Norris at any time, did you?

"A. I can't recall, I can't say.

37 "Q. What is your best recollection?

"A. It would be just a guess, Mr. Shuman.

"Q. And of course you don't want to guess on the subject, but you would not say you did not disclose his name to the defendant, George W. Norris, at all?

"A. I can't say—too long ago for me.

"Q. The lapse of five years makes these things somewhat dim in one's memory, does it not, at least in your memory on this occasion?

"A. Yes; I can't say for certain."

At this point adjournment was taken by the court until 9:30 A. M. of the next day, Wednesday, December 11, 1935.

When this Senate Committee first came to Nebraska it came to Broken Bow and held a session on July 19, 1930, in the Town Hall and the witness was a witness before the Senate Committee at that time. On this occasion Senator Nye asked the witness the questions and the witness answered as quoted below:

"Q. Did you have any conference with other than George W. Norris before he left for his vacation?

"A. No, sir.

"Q. On the point of his candidacy?

"A. No, sir.

"Q. Did you listen in on any conference in which this candidacy was being discussed?

"A. No, sir."

The witness said his statements and the answers "strictly speaking, they were not true." That it was a misleading statement and untrue. That the testimony given here yesterday afternoon (referring to testimony of witness on direct examination is an exact statement of the facts. Also on this same occasion Senator Nye asked this witness the questions and he gave his answers as follows:

"Q. Did you ever pay George W. Norris anything?

"A. I certainly did not.

"Q. Did you ever see George W. Norris paid anything?

"A. I did not.

"Q. Have you any knowledge at all that George W. Norris received any award or contribution at the time he announced himself a candidate for United States Senator?

"A. If he has received anything it is absolutely beyond my knowledge and I don't believe he has received anything."

The witness also came to Lincoln and appeared again as a witness before the Senate Committee September 22, 1930. He said he was sworn as a witness of Broken Bow but did not recall whether he was sworn after that or not, and he understood he was to answer truthfully.

38 At the hearing in September Senator Nye asked and he answered a question as follows:

"Q. Did you know of any connection that Mr. Seymour had with the Primary campaign at that time?

"A. I do not; I did not, and I do not know."

Either the night or the day before the $500.00 bond was received Seymour telephoned the witness. At the conference in the Kearney hotel, the witness told them that he would take the proposition to Norris. Mr. Seymour asked the witnesses to tell Mr. Norris that if he (Norris) would not file for railway commissioner that his filing fees in the sum of $50.00, and his campaign expenses estimated at $500.00 would be paid; that he would receive the support of the Republican Party and that he would be taken care of, and if he did not withdraw within the time limit for filing withdrawals he would receive another $500.00. The next day the witness reported this to defendant Norris. It was witness' recollection that the bond received was a $500.00 Liberty bond, but he said he could not tell for sure.

Redirect examination by Mr. NYE:

Witness was present when the defendant Norris testified before the Senate Committee on September 22, 1930, and heard his testimony. After that the witness appeared before the Committee and the defendant Norris was present when the witness went back on the stand but in what part of the room he did not recall.

FRANK HEALY, called as a witness by plaintiff, testified as follows:

Direct examination by Mr. NYE:

The witness said he resides at Washington, D. C.; has lived there off and on for 20 years; his residence was in Virginia where he resided in 1930; is a lawyer.

Witness said he met the defendant Norris when he first appeared before the Senate Committee in this court room. He could not tell the month but it was in the year 1930. Norris testified on two days before the committee. Witness was a special assistant for the Nye Committee and in particular charge of the Senatorial Campaign in the Nebraska investigation.

Witness saw Norris in Alva, Oklahoma, in June, 1931, in the
39 Safeway Grocery Store. Norris was attending to his store and customers all the time the witness was there and witness conversed with him but stopped when the customers came in. Conversation was at several places in the store. Norris said the $50.00 filing fee and the $500.00 bond were the only amounts he had received on account of the Senatorial campaign. He did not say from whom he received them. He did state he had received them.

Cross-examination by Mr. SHUMAN:

Witness said he was admitted as a lawyer in 1916 and his work with the Committee was gathering evidence in regard to matters this Nye Committee wanted to inquire about.

Witness said that he went to Oklahoma at the direction of Senator Nye at the expense of the Committee, and called upon Norris at the store in which he was working in Alva, Oklahoma. Conversation with Norris was interrupted, as he had to take care of his customers; that he was instructed by Senator Nye and planned to report the information he got there to Senator Nye and did report same to him. Witness was in constant touch with Senator Nye and he gave directions as to what the witness would do throughout this matter. The witness said he was in the store where Mr. Norris worked at least an hour, possibly two, was very much interrupted in talking to him, conversation was broken into a great many times.

VICTOR SEYMOUR, called as a witness by plaintiff, testified as follows:

Direct examination by Mr. NYE:

The witness said he resided in Lincoln in 1930.

Cross-examination by Mr. SHUMAN:

Witness stated that he made a trip to Kearney one Saturday afternoon with Railway Commissioner Hugh Drake in June or July 1930. Was in a meeting with Hugh Drake, Oscar Drake, and A. Paul Johnson at the Ft. Kearney Hotel. The witness said he did

not know whether you would call it one meeting or two, they were in and out at various times during the day and he did not recall whether at any time after the Drake boys came into his room whether he was alone or not. The Sunday in question was the last Sunday before the 4th of July. The witness said he was an attorney but not in practice; was admitted about 43 years ago.

40 The witness said he was called as a witness before this Senatorial Investigating Committee on July 21, 1931; was sworn as a witness; was asked questions by Senator Nye and answered them thus:

"Q. Mr. Seymour, have you had any contact with the pending senatorial campaign in Nebraska?

"A. None whatever. No personal contact—no connection."

The plaintiff, having rested, the defendant moved the court "to direct a verdict for the defendant for the reason that the evidence is insufficient to sustain a conviction if a verdict of guilty should be returned by the jury and that under the evidence there is no issue to submit to the jury." . . .

The court overruled the motion, to which the defendant duly excepted. The defendant offered in evidence Exhibit 13 and same was received in evidence.

Exhibit 13

Exhibit 13 was a judgment of the Supreme Court of Nebraska being set forth in an opinion by Chief Justice Goss dated July 18, 1930, in the case of State of Nebraska ex rel Robert Smith, Relator vs. Frank Marsh, Secretary of State of Nebraska, Respondent. The opinion recites that the cause was heard upon the objection of the relator to the filing of the certificate of nomination, or nomination affidavit filing in the office of the Secretary of State by George W. Norris of Broken Bow, Nebraska, for the office of United States Senator of Nebraska, for the primary election to be held on August 12, 1930.

The findings and judgment of the court are stated in the following language:

"I find that the said certification of nomination or nomination affidavit of George W. Norris of Broken Bow was not filed in the office of the respondent within the time required by law, and find that the Secretary of State is not warranted in certifying the name of said George W. Norris of Broken Bow to the several county clerks and election commissioners in the state as a candidate for the office of United States Senator of Nebraska.

"It is, therefore, ordered that said respondent is hereby directed to omit from the list of candidates for United States Senator of Nebraska, certified by him to the various county clerks and election commissioners, the name of George W. Norris, whose post office address is shown as Broken Bow, Nebraska, and who has been spoken

of in this hearing as George W. Norris, Number Two. It is
41 further ordered that if said list of candidates shall have been sent out, said respondent shall forthwith instruct the various county clerks and election commissioners to omit that name from their publications and from their ballots."

WILLIAM M. DAY, called as a witness by defendant, testified as follows:

Direct examination by Mr. SHUMAN:

The witness said he was the same William M. Day who had testified before. Upon objection to a question by defendant, the witness was cross-examined by Mr. Votava and said that the defendant Norris first testified on September 22, 1930, and was represented by counsel, Mr. Shuman, and that the record shows that Mr. Shuman made this statement after the witness was sworn:

"Mr. Norris, the witness now called, has asked me to represent him as far as may be necessary before the committee.

"The CHAIRMAN. Very well.

"Senator DALE. You mean by that that Mr. Norris will not respond to questioning himself?

"Mr. SHUMAN. No; I don't mean that at all, but I mean to say that if I feel the committee went beyond bounds I would want opportunity to object.

"The CHAIRMAN. Very well."

The witness said he saw Mr. Shuman present during the taking of Mr. Norris' testimony. Judging from the record, Mr. Norris must have concluded his testimony about four o'clock in the afternoon and the committee resumed its hearing on the next day. Seven witnesses appeared before Mr. Norris gave further testimony on the second day, including A. Paul Johnson, who testified immediately before Mr. Norris took the stand on September 23.

Mr. Norris was present at least a part of the time Mr. Johnson was giving testimony. When the defendant Norris came into the Court room where A. Paul Johnson was testifying, Senator Nye asked Norris to come and sit right next to Johnson to hear Johnson's testimony. After Mr. Johnson testified, then the defendant took the stand.

Redirect examination by Mr. SHUMAN:

The only recollection the witness had that the defendant was present when A. Paul Johnson was testifying was the record he made wherein Senator Nye called for the defendant Norris and a
42 note of the witness read "George W. Norris of Broken Bow, Nebraska, here entered the hearing room. The chairman said, 'Mr. Norris, won't you come down and have a chair near Mr. Johnson, because I want you to hear what he is saying.'" The witness stated he had examined the record as to the evidence taken at the hearing and from the record his memory was refreshed and that his

records indicated that Senator Dale "Interrupted and stopped the defendant from answering any of the questions at that place indicated in the record."

After the last question had been answered by the witness when he was last on the witness stand, Senator Nye said, "and the Chair is prepared to announce it does not care to hear any more testimony from Mr. Norris." This statement by Senator Nye was offered in evidence by defendant.

"Mr. VOTOVA. The government objects to the offer of same as incompetent and immaterial, not tending to prove or proving any defense to the charges in the indictment, asking for a conclusion, and in support of the objection we refer to the record made to the first offer of Exhibit 10 as contained on pages 304 and 305.

"The COURT. I will reserve ruling on that."

Later defendant reoffered this same evidence, to which plaintiff objected as follows:

"Mr. VOTOVA. Objected to as incompetent and immaterial, not tending to disprove any of the charges in the indictment and hearsay and self-serving.

"The COURT. I think it is immaterial.

"To which ruling of the court the defendant then and there duly excepted.

"Mr. SHUMAN. We offer to prove by the witness on the stand that the Senator Nye presiding as Chairman on this occasion at the time stated made the statement, 'And the Chair is prepared to announce that it does not care to hear any more testimony from Mr. Norris.'

"Mr. VOTOVA. We object to the offer for the same reason.

"The COURT. Sustained.

"To which ruling of the court the defendant then and there duly excepted."

43 GEORGE W. NORRIS, Defendant, called as a witness in his own behalf, testified as follows:

Direct examination by Mr. SHUMAN:

Witness said his name was George W. Norris; age 36; married; lives at Alva, Oklahoma; is in the grocery business; lived in Nebraska 17 to 20 years; at Kearney, Nebraska, 12 or 13 years; when living at Kearney became acquainted with Oscar Drake and Hugh Drake. Shortly after the first of the year 1929 moved to Broken Bow where was manager of Safeway Store. Made Broken Bow his home until the last of July 1930.

The latter part of June witness went to the County Treasurer's office and paid the filing fee for Railway Commissioner of the State of Nebraska; made this filing on his own volition and choice and sent the application and receipt for filing fee on about June 25, 1930, to Mr. Beynon at Lincoln, with whom he had become acquainted as a boy in Kearney.

About the 2nd day after that Oscar Drake came to see him at the store at Broken Bow where defendant was employed. Oscar Drake

was an attorney of Kearney and a brother of Hugh Drake, who was running for Railway Commissioner. After the witness talked with Oscar Drake, he went to the office of A. Paul Johnson, attorney, and made out and signed an application as candidate for United States Senator. Witness did not know that the meeting of Victor Seymour, A. Paul Johnson, and Oscar and Hugh Drake was to be held in Kearney. He did not know Mr. Seymour and had never heard of him.

About the 2nd day after Oscar Drake called upon him, witness received a phone call asking him to come to Kearney to see him, but he did not go. He ran into A. Paul Johnson on the street, who said he was going to a dance and he asked him to see what Oscar Drake wanted. On the last Monday in June 1930 witness talked to A. Paul Johnson in his office and Johnson said they had a meeting "and the representatives of the Republican Party from Lincoln was at the meeting and that they would guarantee me all the support of the Republican Party and would pay my filing fees and $500.00, I believe that is it.

* * * * * * *

"I believe he said he was Central Committeeman or something of that kind. I wouldn't state—head of the Republican Party."

44 Johnson said that this representative Republican said that witness would have plenty of contributions and would start off with $500.00. The witness said he did not reach any decision when Johnson talked to him that day but he gave consideration to the subject and thought it over, and saw Johnson a day or two later and signed an application in Johnson's office as candidate for United States Senator on July 2, 1930. He said Johnson did not tell him the name of the Committeeman of the Republican party and did not mention the name of Victor Seymour at all. He said the first he heard there was such a man as Victor Seymour was when he got back from his vacation.

Witness said he decided he could not get any support for Railway Commissioner; Mr. Drake had told him he would get all of the support if he filed for the United States Senator and so decided to run for the Senate. He said he made the filing for that office in good faith and felt that with the promise of support he had a chance to win the nomination for that office.

Mr. Johnson gave him the $50.00 filing fee the same day he filed and he called upon the County Treasurer and paid it to him. The next day, July 3, Mr. Johnson gave him a $500.00 bond.

The witness said he took up the matter of being a candidate with the manager of the store in which he was employed and he resigned his position in the store and went away on a vacation, leaving on the evening of July 3. When Mr. Johnson gave him the $500.00 bond the witness also obtained from him $50.00 in money. He told Johnson that he did not have enough money to go on his vacation, didn't have his commission check yet but would like to have some money

because he wasn't sure he could get cash on the bond as the banks were closed and Johnson gave him $50.00. It was a loan which he repaid when he got his commission check. This was another $50.00 other than the filing fee which Johnson gave him.

Late that afternoon the witness left by automobile for his vacation, stopped at North Platte, saw his brother Carl, gave him the $500.00 bond and told him to wire the money to him at Estes Park, where he was going on his vacation.

The brother wired the money to him by Western Union to Estes Park where he got the money and where he spent about a week on a vacation.

45 Witness said he had never been a candidate for any office before and had not taken an active interest in political matters.

The witness said that A. Paul Johnson did not tell him he would give him another $500.00 if he would not withdraw as a candidate for United States Senator. The witness said that he was a witness before the Senate Committee on September 22, 1930, and was summoned by the United States Marshal from Omaha; that he knew of the decision which was rendered on July 18, 1930, in which the Supreme Court of Nebraska ruled that his filing was too late and that a judgment was entered that the Secretary of State should not put his name on the ballot and that he knew this before he was called as a witness—that he had not read the Senate Resolution under which they claimed to act and that he had never been called before a Senate or Legislative Committee at any time.

The witness said that when he was on the witness stand before the Senate Committee he denied he had received any contributions for any campaign and denied that he got $50.00 of any money from anybody to file and that these answers were not true.

On the next day the witness consulted with an attorney, Mr. Shuman, before he went back to the witness stand and was advised as to whether or not he could correct his testimony. After he asked this advice from the attorney he returned to the witness stand. The witness was not in attendance all the time that everybody was testifying but was in the building; in the corridor part of the time. Following the testimony of Esther Alton (Mrs. Peterson), the witness had asked the advice of Mr. Shuman.

Upon returning to the witness stand the witness was asked again about the $50.00 and told the Committee that he had received it; that he had received $50.00 from A. Paul Johnson to pay his filing fee for the United States Senator and that he also received another $50.00 from him; also that he had received a $500.00 bond from A. Paul Johnson. Witness said he also told Senator Nye that he had received a $500.00 bond. After the witness had gone on the stand for the second time and had answered quite a number of questions, Senator Nye made the statement that he did not care to hear any further testimony from the witness. The witness was asked if he did not ask if he could see a copy of his former testimony in order

46 that he might make additional corrections; an objection to the question was sustained. The witness was also asked whether or not Senator Nye said to him that he did not care to hear any further testimony from him, to which objection was made and sustained, and to all of which defendant excepted.

"Q. After you had taken counsel with me and I had advised you in regard to the subject of whether you could go back and correct your testimony, I will ask you to state whether or not you were ready and willing to answer any question that they might ask you correctly and fully when you returned to the witness stand?

"Mr. VOTOVA. Objected to as incompetent and immaterial.

"The COURT. Sustained.

"To which ruling of the court the defendant then and there duly excepted.

"Mr. SHUMAN. Also offer to prove by the witness on the stand that after he had taken counsel with attorney who is making this examination, William E. Shuman, and had returned to the witness stand that he was ready and willing to correct any and all errors or omissions in his testimony and to furnish detailed and accurate information in regard to any of the subjects that he had been asked about before.

"Mr. VOTOVA. We object to the offer for the reason it is incompetent and immaterial.

"The COURT. I will reserve ruling on that.

"Mr. SHUMAN. Did your Honor have some other rulings in reserve?

* * * * * * *

"The COURT. Yes, there was one that is not covered. You offered to show that the defendant was ready and willing to make any and all changes in his testimony. I will sustain the objection as to that.

"To which ruling of the court the defendant then and there duly excepted."

Cross-examination by Mr. VOTAVA:

Witness said he was manager of the Skaggs Store at Broken Bow in 1930; had been a little over a year; prior to that time was a clerk in a store at Kearney about a year; had a high school education but no education beyond that; went to the Army after high school.

When sworn on September 22, 1930, he stated he was going to 47 tell the truth and the whole truth and did testify that he had not received any money from anyone and had not received any assurance of financial support. Knew at the time of testifying he had received $500.00 and the $50.00 and what he was saying was not true.

Witness said when he came to testify in September he asked Mr. Shuman to appear as his attorney. After witness finished his testimony on the first day and before he testified on the second day, he remained in the room or the corridors, knew what witnesses were being examined, heard most of the testimony. Saw Mr. Johnson on the witness stand and heard what he testified to.

WILLIAM M. DAY, recalled as a witness for defendant, testified on September 23, 1930, the defendant George W. Norris in this court room was asked and answered questions as follows:

"Q. Now, Mr. Norris, do you want the story that you have told us of your entire connection with this campaign to stand as your story?

"A. Outside of I might make a few changes in it, the same as Mr. Johnson has. He did give me $50, and on going back to Missouri I mailed back to him the $50. I got a bank draft and mailed it back to him after I got my commission check.

"Q. Mailed it back to whom?

"A. Mr. Johnson.

"Q. You thought, then, Mr. Johnson was paying this $50?

"A. I borrowed it.

"Q. You borrowed it? Didn't you hear his testimony that someone had given him that money to give you?

"A. No; besides that.

"Q. You had borrowed something in addition to that filing fee, $50? A. Yes, sir.

"Q. From Mr. Johnson? A. Yes, sir.

"Q. You sent that back to him?

"A. You will find the transaction there.

"Q. But you never made any reimbursement of the $50 you got for the filing fee?

"A. No, sir; I never paid him that back.

"A. Now, what other changes would you want to make in the story you have told us?

"A. I believe that is all. I would like to go on tomorrow and make some changes.

"Q. Let us make whatever changes are needed there, and if you have made any untruthful statements today surely you know what they are and can correct them now.

48 "A. You mean yesterday?

"Q. Yesterday.

"A. Do you have a copy of that there?

"Q. No; we don't have a copy of that.

"A. That is all that I know, outside of—

"Q. That is all that you know? Now, what of this $500 that was given you?

"A. That was given to me by Mr. Johnson and cashed at North Platte with my brother."

Thereupon both plaintiff and defendant rested.

Thereupon defendant made the following motion:

Motion of defendant for directed verdict and overruling thereof

"Defendant moves the court to direct a verdict for the defendant for the reason there is not sufficient evidence to submit the cause to the jury for their verdict."

The court, ruling on the motion, said:

"Well, I am rather under the impression that there is enough here to go to the jury, on a portion of the indictment."

To which ruling of the court the defendant then and there duly excepted.

Court's instructions to the jury

Munger, D. J.

The COURT. Gentlemen of the Jury, I have sustained a motion of the defendant to exclude from your consideration all the testimany relating to the charge in the indictment which, in substance, was that the defendant had testified fasely that he had written a campaign statement which was published in the Custer County Chief and that no one helped him prepare the statement, and that that statement was mailed by the defendant to A. Paul Johnson at Broken Bow. Because of my sustaining that motion you should entirely disregard that part of the charge and the testimony relating to that statement, its preparation and mailing. I have overruled the motion for a directed verdict so that the case is now ready for argument to the jury.

(Closing arguments to the Jury by counsel for the plaintiff and defendant.)

49 Instructions to the Jury

GENTLEMEN OF THE JURY: This prosecution is brought under a statute of the United States, the essential portions of which read as follows:

"Who ever having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify truly, shall wilfully and contrary to such oath state any material matter which he does not believe to be true, is guilty of perjury and shall be fined not more than two thousand dollars and imprisoned not more than five years."

In view of what has been said in the argument as to the punishment for perjury, it is proper to say to you that that is purely a matter for the court as to what sentence shall be imposed if a verdict of guilty is returned. As the statute says the punishment could be anything in the way of a fine from one penny up to two thousand dollars and the imprisonment could be anything from being placed in the custody of the marshal for a few minutes or being sentenced to a jail for any period of time not exceeding a year or imprisonment in a penitentiary not exceeding two years, there would have to be both a fine and an imprisonment, but the amount of the fine or imprisonment and the place of the imprisonment would be entirely for the court.

It is alleged in the indictment in this case when and where and under what circumstances Mr. Norris testified and this time and place was an occasion in which a law of the United States authorized an oath to be administered if it appears that the United States Senate adopted a Resolution which was offered in evidence, dated in April 1930, providing for an official committee of investigation and, if pursuant to that Resolution the Vice President appointed Senators Nye, Dale, Dill, Patterson, and Wagner as members of such committee, and if in May 1930 at a meeting of the committee at which four of these Senator members were present, as alleged in the indictment, the committee authorized the chairman of the committee to act as a subcommittee, and if Senator Nye, as such chairman, held a public hearing and investigation either by himself or with some other member of the committee pursuant to the Senate Resolution, at Lincoln, Nebraska, and called the defendant as a witness in that investigation, and Chairman Nye then administered an oath to the defendant and the defendant took an oath to testify truly.

This statute says that, "If any person under the circumstances named shall wilfully and contrary to such oath state any material matter which he does not believe to be true, he shall be guilty of a perjury." What is meant by the word "wilfully" as used in this statute? The meaning is, that the person must intentionally state something that is false and which he does not believe to be true. Even though the defendant testified falsely, that is not sufficient to convict him, nor would it be sufficient that he testified falsely but did so carelessly, or negligently, or hastily, but it must appear that he testified falsely and so testified intentionally and that he did not believe this testimony was true when he gave it. Where the statute refers to a statement that is contrary to such oath, it means that the statement must be false, that is, not true. The statute says that the testimony must be as to a material matter, the statement of an opinion would not be a material matter, but it must be a statement of a fact and a fact so related to the subject of the inquiry that it is material to that inquiry and it must be in one or more of the matters charged as false in the indictment. You, of course, realize that there are many ways in which statements under oath may be given. In some instances, it may be very clear as to what the witness means and as to whether he believed or did not believe what he said was true. As an illustration: One may sign an affidavit which he may write himself or which may have been written by some one else but which he has read or has heard read to him and has carefully considered before signing and swearing to it. Then there are other cases where there is not so much time for study and deliberation. Testimony may be given in court or testimony may be given elsewhere by question and answer, and in some instances may come very slowly and deliberately so that there is time to understand the questions and to frame the answers. At other times there may be an impetuous haste so that the time for deliberation is not great. Then there may be instances

where the questions will be very plain, easily understood, simple in language, definite in meaning, and the answers may be very simple, the meaning of which is unmistakable. Then there may be instances where the questions are involved or long or where unusual words are used, where the relationship of phrase to phrase and clause to clause will be such that there may be difficulty in gathering the exact scope and meaning of the question. And in all cases the answer has
51 to be considered under the circumstances in which it is given.

So also an answer itself may be involved and difficult to put in words or hard to express. And we are not all alike. Some may have the gift of expression and clarity; others may have difficulty in expressing themselves on any occasion and might have more difficulty when under oath and trying to be exact. I am stating this in calling your attention to the statute which says you are to consider in effect whether the testimony as given was believed to be true because the belief must be considered in view of the circumstances under which the person made the statement. Of course, it is proper to consider the intelligence, the experience, the education, the understanding of the person who gives the testimony, and his comprehension of the questions asked him and his knowledge of the meaning of the word which he uses in giving his answers. But after considering all of these circumstances, the final and legal test is not what his words might ordinarily mean, not what some one else claims they mean, not what the jury thinks the words mean, and not even the meaning which the words have as defined in the dictionary, although the ordinary meaning of such words is proper for you to consider in ascertaining the meaning which was used by the one giving the testimony. The test that you must consider and use is whether or not the defendant believed the testimony as given was true at the time and in the sense that he understood the questions and in the sense that he gave the answers constituting his testimony.

In a criminal case the guilt of the defendant must be proved beyond a reasonable doubt. I will refer more to this rule later, but I state it now just briefly in order to call your attention to another rule of law that applies in a prosecution of this kind.

Before a verdict finding one guilty of perjury can be rendered there must be proof by the testimony of two or more witnesses or proof by the direct testimony of one witness corroborated by other facts appearing in the case, showing that the alleged testimony of the defendant was false in a material matter as charged in the indictment. If it is alleged in an indictment for perjury that one has made a false statement and at the trial only one witness testified that the statement was false, no conviction can be had because the law regards the oath which was taken by the defendant as balance in a legal sense by the oath of the man who says it was false, and, therefore, the proof is not legally sufficient to show that the alleged statement was false. There must be more than the evidence
52 of one witness to show the falsity of the statement charged.

With these general observations as to the elements of the

offense charged here we will consider the indictment that is being submitted to you. In brief, it is charged that at the investigation before Chairman Nye of the Special Committee of the Senate the defendant gave testimony under oath which was intentionally false and which he did not believe to be true. The testimony that is relied upon by the Government relates, in a general way, to what we may call "a candidacy of men for nomination as candidates for the office of United States Senator from Nebraska" and to a campaign as to such nominations. In the indictment the charge is, that the defendant gave false testimony in response to questions in which were used such words as "campaign", "assurance", "to finance", and other words in connection with those words. There is a definition of those words given by writers of dictionaries such as Webster in which sense a person might use the words. As to the word "campaign", after referring to what its meaning is in the military way, such as a campaign for a connected series of military operations and in metallurgy, Webster gives this definition: "A connected series of operations to bring about some desired result as is done in a military campaign, as a campaign against vice, especially political, an organized series of operations or a systematic effort to influence voters, etc., carried on before an election, a canvass." "Assurance" is defined by Webster as the act of assuring; a declaration tending to inspire full confidence; that which is designed to give confidence. The verb "finance" is thus defined: "to conduct the finances"; "to provide the capital for." What are you to understand was meant by the defendant in the questions and answers constituting the parts of the testimony which you are to consider? There is a common usage about the meaning of such words as "candidate" or "campaign" which is proper for you to consider. It is sometimes said that one is a candidate for president or is a candidate for senator after he has been nominated regularly and up until the time that he is elected or defeated. Then there is another use of the word "candidate" which is not uncommon when it is said that one is a candidate before the nomination. Perhaps more careful usage under those circumstances would be to say that he is a candidate for nomination for president or senator. But it is not uncommon to speak of one as a candidate for such office a long time before he is even nominated. So in using the word "campaign" there is a common usage to refer to a presidential campaign using the word in
53 the sense that after one has been nominated for president he is in a campaign, until the time of election. And there is another common usage to speak of a presidential campaign even before the nomination. In considering the meaning of the words in questions asked of the defendant and in the answers given by him, you have a right to consider the common usage and meaning or the various common meanings or usages of such words and the more exact meaning as defined by the dictionary, but even after considering those meanings still the test for you is, as I have said, to find out the meaning in which the defendant who gave the testimony in

tended in his answers and the meaning of the questions as the defendant understood the words used.

There are laws of Nebraska providing for primary elections which were in force at the time of the giving of this testimony and for some period before. Among other things those laws provided that there should be a primary election in August of certain years at which there might be a vote of electors voting on a printed official ballot to indicate their choice as between candidates for nomination as United States Senator. In order for one's name to appear upon the printed official ballot of a particular party to such a primary election, it was necessary that he should either have filed his application as a candidate to have his name placed upon the official party ballot to be voted on in that primary election, or that petitions of a thousand or more voters should have been filed asking that his name be placed upon the official printed ballot of that party as a candidate for that office and that in either case such written application should have been filed forty days prior to the date of the primary election. There were provisions by which candidates after having nominated themselves, as we will call it, by asking to have their names placed on the official ballot might withdraw, or by which a candidate might decline a nomination where petitioners had asked to have his name placed upon the official ballot. And there were other provisions by which, after the primary election, the names of others could be placed upon the ballot at the final election in November, who had been nominated by convention or by petition or otherwise, but these provisions are not material here because we do not have a situation involving such nominations.

There is evidence here that there was a decision by the Chief Justice in Nebraska, Charles A. Goss, that the nomination papers of George W. Norris of Broken Bow, were rejected and that by that decision the Secretary of State was directed not to place upon the official ballot at the primary election in August 1930, the
54 name of George W. Norris of Broken Bow, because the nomination papers for him had not been filed in time. You will recall that there is testimony that this election was to be held on August 12, 1930, and that the nomination papers of George W. Norris of Broken Bow, were filed in the office of the Secretary of State on July 5, 1930. You will observe from those dates that counting from July 5th on through the balance of the month there were 26 days left and adding the 12 days in August to the date the primary election was held made 38 days and that, therefore, there were not forty days remaining after the time the nomination papers of George W. Norris of Broken Bow, were filed with the Secretary of State and before the time when the primary election was held. The legal effect of such facts and of that decision are that George W. Norris of Broken Bow, was not and never had been entitled to have his name printed on the Republican ballot in the

primary election on August 12, 1930, as a candidate for United States Senator.

There is evidence in the case as to W. M. Stebbins, that on November 5, 1929, a petition had been filed with the Secretary of State containing a large number of names, more than one thousand, nominating him as a candidate upon the Republican official ballot at the primary election to be held in August 1930, that is, as a candidate for United States Senator, and that on November 12, 1929, Mr. Stebbins filed a statement with the Secretary of State accepting that nomination as such a candidate. Those facts did constitute Mr. Stebbins as a candidate for nomination on the Republican official ballot at the primary election for United States Senator from that time on unless he had taken steps to withdraw or which amounted to withdrawal, and there is no evidence that such withdrawal ever occurred.

There is evidence that on January 11, 1930, George W. Norris of McCook, filed his application for nomination as a Republican candidate for United States Senator and so far as the evidence shows no withdrawal of that nomination was ever made. So that there is evidence that from that time on George W. Norris of McCook, was a candidate for nomination on the Republican official ballot in the primary election in August 1930.

Now, turning to the charges in the indictment after its reference to the meaning and the appointment of the committee and the committee's acts, the taking of the testimony, we have the allegations as to the testimony given and as to its falsity and the Government is confined in a case of this kind to the exact false testimony alleged and must prove its falsity in the particular in which it is alleged it is false.

In the first count, it is alleged in substance that the testimony was false wherein Mr. Norris said in substance that he, the said George W. Norris of Broken Bow, Nebraska, had not received any money from anyone in his campaign, meaning the campaign for nomination of United States Senator at the primary election to be held the 12th day of August, 1930, and that he, the defendant, had received no assurance from anyone of financial support and backing or of help in financing his campaign as a candidate for the United States Senate. The Government relies in this prosecution on the claim that these allegations of what the defendant testified to before the Senate Committee is supported by testimony which the Government claims was given before such Committee substantially as follows:

"Q. Did you receive any money from anybody in this campaign?

"A. I did not.

"Q. Now what assurance did you have of financial support and backing?

"A. None whatever.

"Q. In your campaign?

"A. None whatever.

"Q. Did you get any assurance from anybody that they would help you, Republican, Democrats, Independent, or anybody say they would help you finance your campaign?

"A. No, sir."

The Government in this prosecution alleges that his testimony was false in that defendant had received from A. Paul Johnson $50, the exact description and denominations of which were unknown to the grand jury, for use in paying to the county treasurer of Custer County, Nebraska, the defendant's filing fee as a candidate for the office of United States Senator; and in that the defendant had received from A. Paul Johnson a United States Government bond in the sum of $500 to carry on a campaign for the United States Senate; and in that the defendant had received assurance communicated to the defendant from A. Paul Johnson of financial backing in his campaign.

Now, in a criminal case the indictment against the defendant is no evidence whatever of his guilt. You are not to consider the indictment as any evidence or as having any weight whatever in trying the question of the defendant's guilt or innocence. It is a mere writing of the charge that is to be tried. The defendant in any criminal case must be presumed to be innocent of the charge against him and innocent of all material elements of the charge against
56 him until such time as the evidence produced in the case convinces you of his guilt and overcomes the presumption of innocence. The burden of proof is upon the Government in any criminal case to establish the guilt of the defendant and the burden of proof upon the Government is not to establish it by a preponderance of the evidence but to establish his guilt beyond a reasonable doubt. When I say that the burden of proof is upon the government to establish his guilt it is meant that the United States must prove every material allegation of the indictment. Now what are the material allegations in this case? It is necessary for the government to prove that the United States Senate adopted the Resolution set out in the indictment; that pursuant to that Resolution the Vice President appointed the senators named in the indictment as members of that committee; that at a meeting of the committee as set out in the indictment at which four members of the committee were present, the committee authorized the chairman to act as a sub-committee and that Senator Nye acting as a chairman held a public hearing and investigation as provided for under the Senate Resolution at Lincoln, Nebraska, and that the defendant was called as a witness in that investigation and that he then and there took an oath before Senator Nye, as Chairman of that Committee, to testify truly, and that he did testify at Lincoln, Nebraska, on September 22, 1930, in substance and effect as alleged in the indictment. Then the burden of proof is upon the government to show that such testimony was on a material matter and was false and that the testimony was wilfully, that is, was intentionally false, and that the defendant at the time of giving the testimony did not

believe it to be true. The burden is upon the government to prove that this testimony was false, not in general, but in particulars alleged in the indictment in which it is alleged that said testimony was false. The defendant could not be convicted of falsity of testimony unless it was false as charged in the indictment and in the particulars in which the indictment charges that falsity consisted. As to the charge of false testimony given by the defendant, the government must prove that the defendant at the time and place charged did testify in substance and in effect that he, the defendant, had not received any money from anyone in this campaign, meaning the campaign for nomination of United States Senator at the primary election to be held August 12, 1930, or that at that time and place the defendant falsely testified that he had received no assurance from anyone of financial support and backing or of help in financing his campaign as a candidate for the United States
57 Senate, or that the defendant's testimony was false as to both of these charges. There was evidence given that the defendant on the next day after he had first testified before the Senate Committee again testified as follows:

"The CHAIRMAN. Now, Mr. Norris, do you want the story that you have told us of your entire connection with this campaign to stand as your story?

"Mr. NORRIS. Outside of I might make a few changes in it the same as Mr. Johnson has. He did give me $50 and on going to Missouri I mailed back to him the $50. I got a bank draft and mailed it to him after I got my commission check.

"The CHAIRMAN. Mailed it back to whom?

"Mr. NORRIS. To Mr. Johnson.

"The CHAIRMAN. You thought then Mr. Johnson was paying this $50?

"Mr. NORRIS. I borrowed it.

"The CHAIRMAN. Your borrowed it: Didn't you hear his testimony that some one had given that money to give you?

"Mr. NORRIS. No; besides that.

"The CHAIRMAN. You had borrowed something in addition to the filing fee of $50?

"Mr. NORRIS. Yes, sir.

"The CHAIRMAN. From Mr. Johnson?

"Mr. NORRIS. Yes, sir.

"The CHAIRMAN. You sent that back to him?

"Mr. NORRIS. You will find the transaction there.

"The CHAIRMAN. But you never made any reimbursement of this $50 you got for the filing fee?

"Mr. NORRIS. No, sir; I never paid him that back.

"The CHAIRMAN. Now, what other changes would you want to make in the story that you have told us?

"Mr. NORRIS. I believe that is all. I would like to go on tomorrow and make some changes.

"Mr. CHAIRMAN. Let us make whatever changes are needed there, and if you have made any untruthful statements, today, surely you know what they are and can correct them now?

58 "Mr. NORRIS. You mean yesterday?

"The CHAIRMAN. Yesterday.

"Mr. NORRIS. You have a copy of that there?

"The CHAIRMAN. No, we don't have a copy of that.

"Mr. NORRIS. That is all that I know, outside of——

"Mr. CHAIRMAN. That is all that you know? Now, what of this $500 that was given to you?

"Mr. NORRIS. That was given to me by Mr. Johnson and cashed at North Platte with my brother."

As to this testimony you are instructed that this testimony may be considered by you along with the other evidence on the question of whether or not considering what the defendant testified on the day prior and his act of testifying again the following day and what he said in his testimony, the defendant wilfully, that is, intentionally testified falsely in his testimony on the day before in the matters charged against him.

I have said that the burden of proof is upon the government to establish the guilt of the defendant beyond a reasonable doubt. What is the meaning of those words as applied in a case of this kind? The proof in a case of this kind must be sufficient to convince the judgment of an ordinarily prudent man with a conviction upon which he would act without hesitation in a matter of the highest importance to his personal interests. If the degree of proof in this case is such as would not impress the judgment of an ordinarily prudent man with a conviction upon which he would act without hestitation in a matter of the highest importance to his own personal interests, then the proof would not be beyond a reasonable doubt, but by a reasonable doubt you are not to understand that the proof must be beyond an unreasonable doubt. That is to say, you are not to understand that all doubt should be excluded. It is impossible in the determination of these questions to be absolutely certain. You are required to decide the questions submitted to you upon the strong probabilities of the case but the probabilities must be so strong as not to exclude all doubt or possibility of error, but, as to exclude reasonable doubt.

You, gentlemen of the jury, are the sole judges of the facts in the case. You are the sole judges of the testimony, not only what it was but what its value is. You are the sole judges of the credibility of the witnesses. You have the right to consider in determining

59 what weight you will attach to the testimony of any witness the means and opportunity he has for knowing that about which he testifies and his ability to remember and relate. You have a right to consider any interest that any witness has in giving his testimony; if he had a financial interest in the result of the case you would have a right to consider that; if he has an interest other than

financial, you would have a right to consider that. If the jury believe from the evidence that any witness has wilfully sworn falsely on this trial to any matter or thing material to the issues in this case, then the jury are at liberty to disregard his entire testimony except in so far as it has been corroborated by other credible evidence or by facts and circumstances proved at the trial.

So far as I have given you my recollection of the evidence, Gentlemen of the Jury, I have given it to you as my memory has served, but you will understand that you are to be guided entirely by your recollection of the evidence and I have not undertaken to state the evidence even in part except for the purpose of making more clear the legal principles that should be considered in determining this case.

You, Gentlemen of the Jury, took an oath to decide this case upon the law and on the evidence. Notwithstanding any appeals that have been made to you, you should not decide this case on any other consideration. It would not be proper to render a verdict for its effect on public opinion or as an example or because of any feeling of resentment or sympathy, or because of any effect that it might have on politics or on the public or on anyone. When your verdict renders your judgment based solely on the law and on the evidence in the case you have performed your whole duty and fulfilled the oath which you have taken.

Now, there will be given to you when you go to your jury room a copy of that portion of the indictment which is submitted to you, a form of verdict which says, "We find the defendant blank guilty." That, there is a blank before the word "guilty" in which you may write the word "not" if you find the defendant not guilty. If you find the defendant guilty, the verdict is in proper form, but in either case before the verdict is returned into court it should be signed by the foreman whom you will select and when you all return into the court with the verdict so signed, it is your expression of the fact that you have agreed upon the verdict in the form in which it is returned.

60 *Instructions requested by the defendant*

The defendant requested the Court to give the following instructions and the court refused to give any of the instructions so offered, to which defendant excepted:

"1. The Jury are instructed that the burden of proof in this case is upon the Government to establish to the satisfaction of the Jury beyond a reasonable doubt the truth of every essential element of the crime charged and every material allegation of the indictment. The defendant is presumed to be innocent of the crime charged until such time as his guilt is proven by competent evidence beyond a reasonable doubt. (Refused. Defendant excepts.)

"2. The Jury are instructed that the indictment in this case or the fact that an indictment has been filed against the defendant is not to

be taken or considered by you as any evidence whatever of the guilt of the defendant. Such indictment contains simply the charge or allegations made necessary under the law as a basis upon which an accused is to be tried. (Refused. Defendant excepts.)

"3. The Jury are instructed that the law encourages the correction of erroneous and even intentionally false statements made by a witness and if you find in this case that the defendant corrected any false or erroneous statements he might have made while a witness before the Senate Subcommittee, then you will find the defendant not guilty. (Refused. Defendant excepts.)

"4. The Jury are instructed that even if you find that the defendant in this case made false answers to the questions which were put to him at the hearing before the Senate Committee in question, and if you also find that while this hearing was yet continuing and while the matter was yet pending before the Senate Committee, the defendant corrected any erroneous or false statements that were made, if any, then you will find the defendant not guilty (Refused. Defendant excepts.)

"5. The Jury are instructed that if you find that incorrect or false testimony was given by the defendant before the Senate Subcommittee and if you find that he corrected portions of his false or erroneous testimony, but that he did not correct all of his erroneous or false statements, and if you further find that he would have, in your opinion, corrected all statements that he made which were false or erroneous, had he been permitted to do so, then in that case,
61 you will also find the defendant not guilty. (Refused. Defendant excepts.)

"6. The Jury are instructed that if you find the defendant, in the latter portion of his examination before the Senate Committee, corrected statements that may have been incorrect or even intentionally false, made prior to the correction of the defendant, then you will find the defendant not guilty. (Refused. Defendant excepts.)"

The indictment which the trial judge submitted to the jury which is referred to in his instruction, is the identical indictment as shown on pages 5–15 hereof except that all matters included within brackets were not included in the draft of the indictment which the trial judge submitted to the jury.

In United States District Court

Praecipe for transcript

Filed February 4, 1936

To the CLERK OF SAID COURT:

Please make transcript of appeal in the above cause and include therein:

1. Indictment. (Count One only.)
2. Demurrer to indictment.
3. Order overruling demurrer.

4. Arraignment and plea.
5. Journal entries showing trial.
6. Verdict.
7. Motion for new trial.
8. Order overruling motion for new trial.
9. Judgment on verdict and sentence.
10. Notice of appeal.
11. Order allowing appellant to perfect appeal, dated January 2, 1936.
12. Assignment of errors with acknowledgment of service.
12½. Bill of exceptions.
13. Bond on appeal, and approval of court.
62 14. This praecipe, showing acknowledgment of service.

Dated this 4th day of February, 1936.

WM. E. SHUMAN,
BERT L. OVERCASH,
Attorneys for Defendant.

Received copy of the foregoing Praecipe this 4th day of February, 1936.

BARLOW NYE,
Assistant District Attorney.

Stipulation of counsel approving bill of exceptions

It is hereby stipulated by and between the parties hereto by their respective counsel that the foregoing transcript of Evidence, motions, objections, and rulings thereon, in the above cause correctly shows all necessary proceedings on said trial and is true and correct.

Dated at Lincoln, March 11th, 1936.

BARLOW NYE,
Assistant United States District Attorney.
WM. E. SHUMAN,
BERT L. OVERCASH,
Attorneys for Defendant.

In United States District Court

Order approving bill of exceptions

I, the undersigned, United States District Judge, who presided at the trial of the above entitled cause, do hereby certify that the foregoing bill of exceptions of defendant George W. Norris contains all the material facts, matters, things, proceedings, rulings, and exceptions thereto occurring upon the trial of said cause and not heretofore a part of the record herein, including all evidence adduced at the said trial, and I further certify that the exhibits referred to in the foregoing bill of exceptions constitute all of the exhibits introduced in evidence at said trial, and I hereby make all of said exhibits a part of the foregoing bill of exceptions, and I hereby settle and allow the foregoing bill of exceptions as a full, true, and correct bill of

exceptions in this cause and order the same filed as a part
63 of the record herein, and direct the Clerk of this Court to transmit said bill of exceptions to the Circuit Court of Appeals for the Eighth Circuit.

Dated this 20th day of March, 1935.

THOS. C. MUNGER,
United States District Judge.

[Clerk's Certificate to foregoing transcript omitted in printing.]

64 [Appearances of counsel omitted in printing.]

65 In United States Circuit Court of Appeals

Order of submission—October 5, 1936

This cause having been called for hearing in its regular order, argument was commenced by Mr. William E. Shuman for appellant, continued by Mr. Joseph T. Votava, United States Attorney, for appellee, and concluded by Mr. William E. Shuman for appellant.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

66 In United States Circuit Court of Appeals, Eighth Circuit

No. 10,553.—November Term, A. D. 1936

GEORGE W. NORRIS, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the District Court of the United States for the District of Nebraska

Mr. William E. Shuman (Mr. Bert L. Overcash was with him on the brief) for Appellant.

Mr. Joseph T. Votava, United States Attorney (Mr. Ambrose C. Epperson, Assistant United States Attorney, Mr. Fred. G. Hawxby, Assistant United States Attorney, and Mr. Barlow Nye, Assistant United States Attorney, were with him on the brief) for appellee.

Before GARDNER, SANBORN, and FARIS, Circuit Judges

Opinion—November 19, 1936

FARIS, Circuit Judge, delivered the opinion of the Court.

Appellant, convicted of perjury and as punishment therefor sentenced to three months in jail, and fined one hundred dollars, appealed in the conventional manner, as was then and now provided by rules in such case provided.

67 Except for the precise questions asked appellant by the Senate Subcommittee (hereinafter referred to as Committee) and his answers thereto, and the further questions raised by the alleged fact that he had in his testimony before the Committee purged himself of his alleged perjury, by correction and retraction, the case does not materially differ, either in fact or law, from the case of Seymour v. United States, 77 Fed. (2d) 577. The alleged perjury here considered, occurred in the same investigation by the same Committee, and under the same conditions and legal situation dealt with in the Seymour Case, and so such further facts as may be deemed not sufficiently relevant as to render repetition necessary here, may be read by the curious in the Seymour Case, supra.

In the case at bar, the questions propounded to appellant, by the Committee, and his answers thereto, which are alleged to have been false, were as follows:

"Q. Now what assurance did you have of financial support and backing?

"A. None whatever.

"Q. In your campaign?

"A. None whatever.

"Q. Did you get any assurance from anybody that they would help you—Republican, Democrat, Independents, or anybody say they would help to finance your campaign?

"A. No, sir.

"Q. Did you receive any money from anybody in the campaign?

"A. I did not."

It is urgently contended by appellant that upon a strict construction (which it is insisted the law grants to him) his answers were truthful, and for this reason among others, the trial court should have directed a verdict in his favor, as he properly and procedurally prayed.

The second point of difference between the instant case and the Seymour Case, supra, is as forecast, that, the alleged perjury occurred on September 22, 1930; but that appellant, at his own request, and while the hearing and investigation were by the Committee current, and unfinished, again took the witness stand on September 23, 1930, and the following proceedings were had, and the following questions and answers were asked of and made by him:

68 "Q. Now Mr. Norris, do you want the story that you have told us of your entire connection with this campaign to stand as your story?

"A. Outside of, I might make a few changes in it, the same as Mr. Johnson has. He did give me $50.00. I got a bank draft and mailed it back to him after I got my commission check.

"Q. Mailed it back to whom?

"A. Mr. Johnson.

"Q. You thought, then, Mr. Johnson was paying this $50?

"A. I borrowed it.

"Q. You borrowed it? Didn't you hear his testimony that someone had given him that money to give you?

"A. No; besides that.

"Q. You borrowed something in addition to that filing fee, $50?

"A. Yes, sir.

"Q. From Mr. Johnson?

"A. Yes, sir.

"Q. You sent that back to him?

"A. You will find the transaction there.

"Q. But you never made any reimbursement of the $50 you got for the filing fee?

"A. No, sir; I never paid him that back.

"Q. Now, what other changes would you want to make in the story you have told us?

"A. I believe that is all. I would like to go on tomorrow and make some changes.

"Q. Let us make whatever changes are needed there, and if you have made any untruthful statements today surely you know what they are and can correct them now.

"A. You mean yesterday?

"Q. Yesterday.

"A. Do you have a copy of that there?

"Q. No; we don't have a copy of that.

"A. That is all that I know, outside of——

"Q. That is all that you know? Now, what of this $500 that was given to you?

"A. That was given to me by Mr. Johnson and cashed at North Platte with my brother."

Based upon the above evidence, given in the hearing before the Committee, appellant now contends that either a directed
69 verdict in his favor should have been ordered by the court, or at least, that certain instructions offered by him upon the trial and refused by the court should have been given.

These refused instructions were as follows:

"The Jury are instructed that even if you find that the defendant in this case made false answers to the questions which were put to him at the hearing before the Senate Committee in question, and if you also find that while this hearing was yet continuing and while the matter was yet pending before the Senate Committee, the defendant corrected any erroneous or false statements that were made, if any, then you will find the defendant not guilty.

"The Jury are instructed that if you find the defendant, in the latter portion of his examination before the Senate Committee, corrected statements that may have been incorrect or even intentionally false, made prior to the correction of the defendant, then you will find the defendant not guilty."

As forecast, it is urgently insisted here, by appellant's learned counsel, that neither of the four answers of appellant was false; but

each of them was strictly true. This insistence is bottomed on the alleged fact that appellant had never engaged in, nor was he at all involved in a campaign, because his intended campaign for United States Senator, had been, after he had filed his application and certificate, cut short by the decision of the Supreme Court of Nebraska, on the ground that his application had been untimely filed, and so he was not permitted to have a place on the ticket to be voted August 12, 1930, at the primary election. He had filed this application with the Secretary of State of Nebraska on the 5th day of July 1930, only some thirty-eight days prior to the day of the primary election. Since the Nebraska statute required all such applications to be filed not less than forty days before such primary election, the Supreme Court of Nebraska held, by a judgment rendered on July 18, 1930, that appellant's application was untimely filed and ordered that appellant's name should not be put on the ballot.

So, since all of the questions, except one asked and answered by appellant referred to a campaign, it is insisted that appellant answered these questions with absolute truth, because he contends, he never engaged in a campaign; for the simple reason that the
70 ruling of the Nebraska court prevented the placing of his name on the ballot. So, it is seriously urged, that a question to appellant about any matter pertaining to a campaign, or to his campaign is a question about a non-existing thing. The insistence clearly involves the most attenuated casuistry. Nothing is clearer, from this record and the record in the case of Seymour v. United States, supra, which, because this case and that one are interrelated, we are permitted to notice, (Freshman v. Atkins, 269 U. S. 121) than that the word "campaign" as used in this case and on the hearing before the Committee, was fully and clearly understood by both appellant and the members of this Committee. It meant as the context shows, the acts and efforts of the appellant to bring about his nomination as the Republican candidate for the office of United States Senator from Nebraska, and everything indicates that appellant so understood it when he answered the three questions which contained the word. True, divers circumlocutory phrases could have been substituted for the word "campaign", which would have described more graphically the abysmally sordid political trickery attempted to be worked by appellant and those who conspired with him. Many of these synonymous circumlocutions are obvious, but the use of such of them, by the Committee, as would have served to characterize the situation accurately, might well have seemed to prejudge the finding of the Committee. The word campaign is in the public domain. It has no technically legal use. If it had, many of the cases cited to us by the appellant might well be in point. The meaning of the word campaign, when applied to a candidacy for an office is known of all men. True, its constituent elements—the things which are done in a campaign—differ from zero to infinity. The word means, when applied to a personal political candidacy, all of the things and neces-

sary legal and factual acts done by the candidate and his adherents, in an effort to obtain a majority or plurality of the votes to be cast in any election for a public office. When it is necessary, as in Nebraska, to pay a filing fee, and file with the Secretary of State an application for a place on a ticket to be voted at a primary election, and these things are done, two of the constituent elements of a campaign for an office have been done. In short, a campaign for a public office in a public election, merely and simply means, running for office or candidacy for office, as the word is used in common parlance and as it is understood by the man in the street. What further may
71 be done by the candidate after announcing his candidacy, or after compliance with local statutes by which he becomes a legal candidate, rests in the discretion of the candidate and in the wisdom (or folly) of his friends. He may not spend one dollar, or he may spend many—but not now, as regulated by law, too many. He may "sit on the front porch", and let the voters come to him, or he may "make a swing around the circle" and personally go after the voters. So much is said in order to make plain the view, that the meaning of the word campaign, when applied to one running for a public office, has no relation to the nature, or sum, that is, quantity or quality of the efforts put forth; for such efforts may be few, many, or even none. Just prior to appellant's answering the crucial questions here under discussion, he had testified before the Committee as to the circumstances and reasons for his filing an application to be put on the primary ticket as a candidate for United States Senator. While much, if not all of this testimony was false, evasive and wholly disingenuous, as this record now indicates, it yet clearly indicates we repeat, that he knew precisely what was meant by the word campaign, when that word was used in the questions asked him.

When appellant filed his application for a place on the ticket to be voted at the primary election, he became in effect a candidate for the office of United States Senator from Nebraska, for by that public act he expressed his desire for the office and his willingness to accept it. This desire and willingness he never voluntarily renounced. He was running for office; he was a candidate for office, (see, Adams v. Lansdon, 18 Idaho 483; Leonard v. Commonwealth, 4 Atl. 220; State v. Bates, 102 Minn. 104), at least from July 5, 1930, when he filed his verified application, till July 18, 1930, when the Supreme Court of Nebraska ordered that his name be omitted from the ticket. Whether he did any more, or whether he did any other act to forward his candidacy is wholly immaterial; surely, the question whether he did few or many things has no bearing upon the meaning of the word campaign; for the simple reason, that if the inquiry shall be as to how many things and the nature thereof, are necessary to constitute a campaign, an answer becomes impossible, for no criterion exists as to the nature, number, quantity or quality of things done, which would enable us to say that on the one side a campaign exists, and on the other side there is none.

72 We are constrained to the view that the argument advanced is hypercritical, and so disallow it without more. It follows, that the trial court did not err in refusing to direct a verdict in favor of the appellant on the ground that as a matter of fact, appellant's answers were true. It is clear that his first answer was false, upon any view.

After the charge to the jury, to which otherwise no exceptions were taken, appellant requested the court to charge the jury touching the legal effect of appellant's second appearance on the stand and his change and alleged correction of his testimony. These instructions appear above in the statement of the case. The court below refused to give these instructions or either of them and appellant excepted.

We are constrained to the opinion that this refusal constituted error. As early at least, at 1669 (See, Roy v. Carr, 1 Siderfin's Rep. 418) it was held by the King's Bench in England, that a false answer in chancery is purged of perjury, if, in a subsequent answer filed in the cause, the false answer is corrected. From the above case seemingly, the well-settled modern rule had its origin. This rule is well stated in Bishop on Criminal Law (9th Ed.) Sec. 1044a, thus:

"The law encourages the correction of erroneous and even intentionally false statements on the part of a witness and perjury will not be predicated upon such statements when the witness, before the submission of the case, fully corrects his testimony. Says the New York Supreme Court 'a judicial investigation, or trial has for its sole object the ascertainment of the truth, that justice may be done, it holds out every inducement to a witness to tell the truth by inflicting severe penalties upon those who do not. This inducement would be destroyed if a witness could not correct a false statement except by running the risk of being indicted and convicted of perjury.'"

Ruled cases upon the point are few, but so far as we can find unanimous in upholding the view of the law on the point taken in Mr. Bishop's excellent work, quoted above. (See, People v. Brill, 165 N. Y. S. 65; Henry v. Hamilton, 7 Blackf. (Ind.) 506; People v. Gillette, 111 N. Y. S. 133; Brannon v. State, 94 Fla. 656, 114 So. 429; Bijur v. Bendix, 285 F. 974). In fact no case, called to
73 our attention by counsel, or which we have been able to find, contravenes the law upon the point as written by Mr. Bishop. Even two of the three cases cited herein by appellee affirm it as being the law.

Counsel for appellee, however cites and strongly relies on the case of Seymour v. United States, 77 F. (2d) 577, 582, decided by this court, which is as said already an interrelated case and which arose out of perjury committed by the appellant therein, one Seymour in the identical hearing before the Committee, which is involved in the instant case. In the Seymour Case, supra, we used this language:

"This situation is that, if false material testimony was knowingly given, perjury had been committed and nothing thereafter done could

alter that situation, while if such testimony was the result of an innocent mistake it was not perjury."

If the facts in the Seymour Case, supra had been upon the point under discussion, similar to the situation here confronting us, the last-quoted language would constitute a statement of the legal rule on the point in fairly direct contradiction of what we deem to be the true rule of law. But the facts in the Seymour Case, must be held in mind. The accused therein had given before the same Committee, testimony which seemingly was the subject of newspaper comment after appellant here and others had testified. Upon seeing such comment, Seymour wired from Denver, to the Chairman of the Committee among other things not pertinent, thus: "In justice to the Committee and myself I will be glad to appear before the Committee at Washington any time after the middle of November, which may suit your convenience. At present my time is fully occupied with duties requiring my personal presence here." Based on the above telegram, Seymour, insisted on an appeal to this court that an instruction should have been given by the trial court in his case bottomed upon the above telegram, as a bona fide, but incompleted attempt to correct false testimony.

In responding to the latter contention and in disallowing it, this court used the language quoted above from the opinion in the Seymour Case, upon which appellant relies. But the facts here upon the point under discussion, in this instant case are not at all similar to the facts in the Seymour Case. Here appellant, on the day following his giving of the answers now here relied on by
74 appellee as constituting perjury, and of course, while the hearing and investigation had not been completed and was continuing, was again called to the witness stand and he there and then corrected, or attempted to correct, the false answers given by him on the day before. In the Seymour Case the accused therein never again took the stand, nor did he correct, or attempt to correct, the false statements made by him as a witness in the hearing. In fact, his telegram to the Committee does not by its language amount to a request that he be allowed to correct anything he had theretofore sworn to, nor is there any admission or intimation in it that he had sworn falsely. So, it did not even constitute "a bona fide but incompleted attempt to correct false testimony." At best, it simply indicated his willingness, at his own convenience, to give further testimony; whether true or false, does not appear.

It was in response to this situation and contention, that this court used the quoted language found in the opinion in the Seymour Case, and which is relied on by appellee as a categorical ruling by this court, that a witness, who has sworn falsely, may not under any circumstances thereafter purge himself thereof. The language relled on by appellee, when considered in the light of the facts up for judgment in the Seymour Case was obiter dictum merely. For undoubtedly the rule, to be applied in a situation such as is presented

in the case at bar, is that when a witness in a trial, hearing, or investigation has, whether intentionally or unintentionally given false, or perjured testimony; but afterwards in the same trial, or hearing, or investigation, and before such trial, etc., has been completed, fully corrects all false answers and statements theretofore made by him, he cannot be successfully prosecuted for perjury. Of course he must fully and fairly correct all false statements formerly sworn to by him, and on which a prosecution for perjury could otherwise be bottomed. He cannot purge himself thereof only in part, or doubtfully and evasively, but must do so fully. If what he last swore comprehends a full correction, his last testimony comprises the ultimate facts in the case, so far as the witness is concerned. If he shall correct fully and fairly, every false statement theretofore made by him, on which a charge of perjury might be, or is, as here bottomed, it may well be that the matter is one for the court, and in a trial for perjury, may well warrant a directed verdict of acquittal in favor of the accused.

75 But if his correction is doubtful or evasive, or not full and fair, the question whether he has purged himself is one for the jury.

The charge asked by appellant in the first clause of the quoted requested charges is upon one view ambiguous and not clear. But the language of the last clause of the requested charge, we think, so far as it goes, correctly states the law, and should have been given. Upon another trial, if the proven facts shall be similar upon the point to those in the record before us, some such charge as that suggested below should be given to-wit:

The jury are charged that the law encourages the correction of erroneous and even intentionally false statements made by a witness upon a trial or hearing, and so, if you shall find and believe from the evidence that defendant made false answers to the questions or any of them which were put to him at the hearing before the Senate Subcommittee (which questions are set out in the indictment and which questions the court has already in this charge called specifically to your attention), yet that defendant, while the hearing was continuing and unfinished again took the witness stand and then and there fully corrected all erroneous or false statements, if any, which had theretofore been made by him in answer to said questions, you should find the defendant not guilty.

Appellant further contends that the trial court erred in refusing to permit him to testify on the trial below that he was willing, when he returned to the witness stand in the hearing before the Committee to correct any other part of his false statements made by him when first testifying, if he had been permitted to do so. This appellant urges, should have gone to the jury as bearing on his intent.

On this point the record quoted above herein shows seemingly all that occurred when appellant last took the stand in his effort to retract. All this was before the jury. He did say that he would like

to go on the stand "tomorrow and make some further changes." To that request the Committee said to him, in effect, that he could make such changes at that time, as he desired to make, and in effect refused to hear him on the next day. In short, he was afforded ample opportunity to tell the whole truth which no one knew better than he.

76 The Committee was under no obligation to subserve his further convenience, or to afford him more than one opportunity to fully retract. This one opportunity was accorded to him, and in the state of the record on the point we are of opinion the trial court did not err in refusing to permit him to answer touching the undisclosed state of his mind when his retraction, or attempted retraction, was made. The authority for the contention (48 C. J. 828, citing only the case of Thrasher v. State, 237 P. 139) is not so clearly in point in its facts, as to convince that the contention is well taken. The desire to correct should be indicated by facts occurring during the trial or hearing, and not by an alleged state of mind existing some five years after the lawful right to correct had expired.

As already indicated, the alleged perjury of appellant was committed at the identical hearing before the Committee, heretofore considered by this court in the Seymour Case, supra. In that case appellant here was permitted to file a brief as amicus curiae, in which, as also in the briefs of Seymour, all questions now raised (except those discussed above in this opinion) were presented and ruled by this court against the contentions of appellant herein. After again considering these questions, we are not convinced that the views then held and expressed were erroneous upon any rule of law on any question up for judgment in that case. As already said, the question of retraction pending the hearing was not in that case; otherwise in principle the two cases are wholly similar. True it is, that in the Seymour Case the object intended to be accomplished by political trickery was in aid of the candidacy at the primary election of one Stebbins who was running against Senator George W. Norris of McCook, Nebraska; while here in the instant record, this object appears to have been the more innocent one of getting rid of appellant as a proposed candidate for Railroad Commissioner. Yet the fact remains that appellant was, for a time at least a candidate for the nomination at the primary election for Senator of the United States from Nebraska. So, the difference is not deemed of sufficient legal importance to change the views we have heretofore announced upon the situation.

Since we are of opinion that whether appellant fairly and fully purged himself of all of the false statements charged to have been made by him is not clear on this record, and since, in effect, he based a part at least of his retraction on the testimony of the witness Johnson, he should be permitted, if he is so advised, to

77 offer the whole of the testimony given by Johnson when the latter corrected his own statements made to the Committee when he was recalled by the Committee. We think the indictment was insufficient as against the attacks made on it.

It follows that for the error in refusing to submit to the jury the question whether appellant had fully and fairly retracted and corrected his original false statements the case should be reversed and remanded for a new trial, which accordingly is ordered.

78 In the United States Circuit Court of Appeals, Eighth Circuit

No. 10553

GEORGE W. NORRIS, APPELLANT

vs.

UNITED STATES OF AMERICA

Judgment.—November 19, 1936

Appeal from the District Court of the United States for the District of Nebraska.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Nebraska, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, reversed without costs to either party in this Court.

It is further ordered by this Court that this cause be, and the same is hereby, remanded to the said District Court with directions to grant a new trial.

79 [Clerk's Certificate to foregoing transcript omitted in printing.]

80 Supreme Court of the United States

Order allowing certiorari

Filed February 1, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(Endorsement on cover:) File No. 41140. U. S. C. C. of Appeals, Eighth Circuit. Term No. 600. The United States of America, petitioner, vs. George W. Norris. Petition for writ of certiorari and exhibit thereto. Filed December 24, 1936. Term No. 600 O. T. 1936.

U. S. GOVERNMENT PRINTING OFFICE: 1937

DEC 24
CHARLES ELMORE

No. 600

In the Supreme Court of the United States

OCTOBER TERM, 1936

THE UNITED STATES OF AMERICA, PETITIONER

v.

GEORGE W. NORRIS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Specification of errors to be urged	4
Reasons for granting the writ	5

CITATIONS

Cases:	
Bijur v. *Bendix*, 285 Fed. 974	7
Brannen v. *State*, 94 Fla. 656	7
Henry v. *Hamilton*, 7 Blackf. (Ind.) 506	7
Martin v. *Miller*, 4 Mo. 47	7
People v. *Brill*, 100 Misc. 92	7
People v. *Gillette*, 126 A. D. 665	7
Popper, Matter of, 193 A. D. 505	7
Roy v. *Carr*, 1 Sid. 418, 82 Eng. Rpt. 1191	6
Seymour v. *United States*, 77 F. (2d) 577	7, 8
Statutes:	
Criminal Code, Section 125 (U. S. C., Title 18, Section 231)	2
Miscellaneous:	
Senate Resolution No. 215, 72 Cong. Rec. 3967	3

114738—36

In the Supreme Court of the United States

OCTOBER TERM, 1936

No. —

THE UNITED STATES OF AMERICA, PETITIONER

v.

GEORGE W. NORRIS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit in the above entitled case, entered on November 19, 1936.

OPINIONS BELOW

The charge of the trial court appears at R. 48–61. The opinion of the Circuit Court of Appeals (R. 66–77) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 19, 1936. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act

of February 13, 1925, and under Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether a witness who wilfully perjures himself renders himself immune to indictment if, before the end of the proceedings, he again takes the witness stand and testifies truthfully as to the matters concerning which he theretofore testified falsely.

STATUTE INVOLVED

Criminal Code, Section 125 (U. S. C., Title 18, Section 231), reads as follows:

> *Perjury.* Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath, state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than $2,000 and imprisoned not more than five years.

STATEMENT

The Honorable George W. Norris, United States Senator from the State of Nebraska, was a candidate for reelection in 1930 (R. 28). In the campaign of 1930, certain political strategists in Ne-

braska procured another George W. Norris, of Broken Bow, Nebraska, to file for the Republican nomination for United States Senator (R. 34–36). In consideration for filing in opposition to Senator Norris the respondent was paid $50.00 to cover his filing fee and was given $500.00 for campaign expenses and was promised a further sum of $500.00 if he did not withdraw within the period permitted by law for withdrawals (R. 35). The money was furnished by Victor Seymour, whose conviction of perjury in testifying before the special Senate Committee investigating this matter was affirmed by the Circuit Court of Appeals for the Eighth Circuit in *Seymour* v. *United States*, 77 F. (2d) 577.

This conspiracy came to the attention of a special Senate Committee headed by Senator Gerald P. Nye of North Dakota, which had been directed to investigate campaign expenditures and all relevant facts with relation thereto which would be of public interest and which would aid the Senate in the enactment of remedial legislation. This Committee was empowered to issue process and to administer oaths. See Senate Resolution No. 215, 72 Cong. Rec. 3967 (R. 26–27). This Special Senate Committee met at Broken Bow, Nebraska, July 19, 1930, and at Lincoln, Nebraska, July 21, 1930, and September 22–24, 1930 (R. 30–31). The respondent, George W. Norris (of Broken Bow), testified before the Committee on September 22, 1930, that he had been paid no money

and had received no assurance whatever of financial support for his campaign for nomination for the United States Senate (R. 33). At this time the respondent was represented by counsel present at the hearing (R. 41) and admittedly knew that the above statements were false (R. 43–46). The following day, September 23, 1930, after seven other witnesses had testified and after hearing (R. 41) at least a part of the testimony of witness Johnson (R. 34–38), exposing the falsity of respondent's testimony, the respondent again took the stand and gave testimony which served in part at least to correct his earlier false testimony (R. 47–48).

The respondent was convicted of perjury (R. 14–15). His motion for a new trial was overruled (R. 17) and he was sentenced to pay a fine of $100.00 and be imprisoned in jail for a period of three months (R. 18). He appealed to the Circuit Court of Appeals for the Eighth Circuit, which reversed the judgment of the trial court and remanded the cause for a new trial at which it could be determined whether or not he had purged himself of all of his false testimony.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Eighth Circuit erred:

1. In holding that the trial court erred in refusing to submit to the jury the question whether respondent had fully and fairly retracted and corrected his original false testimony.

2. In reversing the judgment of the United States District Court for the District of Nebraska.

REASONS FOR GRANTING THE WRIT

The court below held that the jury should have been instructed to find respondent not guilty if he, "while the hearing was continuing and unfinished again took the witness stand and then and there fully corrected all erroneous or false statements."

This decision flies in the teeth of Section 125 of the Criminal Code, *supra,* which, without qualification as to subsequent correction, punishes "whoever * * * shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true."

The decision presents an alarming obstacle to effective judicial, legislative, and administrative investigation. A witness may take the stand and, with relatively complete impunity, give whatever false testimony may serve his purpose. If other witnesses persuasively contradict him, he needs only to change his testimony so that it harmonizes with the facts then known in order to escape all consequences of his perjury. So interpreted, the perjury statute is no longer an effective sanction to insure that honest testimony be given but becomes merely a procedural device through which the truthful testimony, if interposed to refute the perjury, may subsequently corroborated by the per-

jurer. If the perjury be uncontradicted at the hearing or trial, the perjurer may remain silent, running only the slight risk that there may be a subsequent investigation which will reveal his perjury.

The facts of this case serve as a striking example of the consequences of such a rule. The conspirators, distinguished more by their knavery than by their subtlety, sought to impede the reelection of a distinguished public servant by promoting the candidacy of respondent, who bore the same name. Upon investigation of the Senate Committee he at first stoutly maintained that his was a purely voluntary and unsolicited desire to run for the United States Senate and that no one had given him money or assurance of financial aid (R. 33). Other witnesses then testified that he had been paid $50, had received a $500 bond and had been promised another $500 if he did not withdraw (R. 35, 39). The respondent then took the stand and gave new testimony which was in partial conformity with that offered by other witnesses (R. 47–48). We submit that the whole purpose of the perjury statute is defeated if the respondent be held beyond punishment for his deliberate deception of the investigating committee merely because, one supposes, he subsequently recognized that this deception was unsuccessful.

The court below relied upon several common-law cases decided by the English and state courts. *Roy*

v. *Carr,* 1 Sid. 418, 82 Eng. Rpt. 1191; *People* v. *Gillette,* 126 A. D. 665; *People* v. *Brill,* 100 Misc. 92; *Henry* v. *Hamilton,* 7 Blackf. (Ind.) 506; *Brannen* v. *State,* 94 Fla. 656. In each of these cases the alleged perjury was corrected by the witness voluntarily and not, as here, after an interval during which there was introduced contradictory evidence for the witness to weigh with an eye toward a perjury prosecution. *Bijur* v. *Bendix,* 285 Fed. 974, 975 (App. D. C.) was a patent interference suit in which the court rejected an attempt to defeat priority because of a supposed perjury, where the witness "rectified it almost immediately, saying that he had misunderstood the first question." It is of some significance that in *Matter of Popper,* 193 A. D. 505, a disbarment case, the court emphasized the fact that the perjury was corrected after knowledge of its refutation, and held the principle of *People* v. *Gillette, supra,* inapplicable; the case, however, was rested on the distinction between the standards required for disbarment and for conviction. And in *Martin* v. *Miller,* 4 Mo. 47, where the report does not show whether or not the correction was made after contradictory evidence, the court held, in an action of slander, that subsequent correction could not purge the original testimony.

The court below was, we submit, on far sounder ground in its decision of *Seymour* v. *United States,* 77 F. (2d) 577. There it held that Seymour's

subsequently telegraphed offer to correct his testimony did not condone his perjury, and said (p. 582):

> When false testimony concerning a material fact has been knowingly given, perjury has become and continues to be an accomplished and completed thing.

The facts of the two cases are distinguishable, but the *Seymour* case, in contrast to the one at bar, recognizes the basic principle of the crime of perjury.

This case presents a question of continuing importance to the processes of judicial, legislative, and executive investigation. The decision below, unless corrected, would tend to reduce the perjury statute to a status which may often, as in this case, be one of practical impotence. While the crime for which the indictment was found was perjury, an old common-law offense, its effect upon the complicated investigations of modern government cannot be overemphasized. Particularly is this true when the investigation is one which, as here, is based on determining the need for future legislation to protect the integrity of the citizens' choice of governmental officials.

Wherefore, it is respectfully submitted that this petition presents a question of importance which has not been, but should be, decided by this Court and should, therefore, be granted.

STANLEY REED,
Solicitor General.

DECEMBER 1936.

U. S. GOVERNMENT PRINTING OFFICE: 1936

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No. 600

In the Supreme Court of the United States

OCTOBER TERM, 1936

THE UNITED STATES OF AMERICA, PETITIONER

v.

GEORGE W. NORRIS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	5
Specifications of errors to be urged	17
Summary of argument	18
Argument:	
Introductory	20
I. The Senate Committee was competent to institute, and to exact evidence in, the inquiry in which the respondent testified	21
II. A law of the United States authorized an oath to be administered in the inquiry in which the respondent testified	28
III. The questions to which respondent answered falsely were material to the inquiry in which respondent testified	29
IV. The respondent did not cease to be a perjurer by retracting his false testimony the day after it had been given and he had left the stand	33
A. On the basis of principle a witness should not be allowed to escape the penalties of perjury by recanting his false testimony	38
B. On the basis of authority a witness should not be allowed to escape the penalties of perjury by recanting his false testimony	44
1. English cases	44
2. Cases in the American state courts	53
3. Cases in the Federal courts	60
Conclusion	62

CITATIONS

Cases:	
Adams v. *Lansdon*, 18 Idaho, 483, 110 Pac. 280	32
Allen v. *Westley*, Hetley 97, 124 Eng. Rep. 372 (1629)	20, 48
Barry v. *United States ex rel. Cunningham*, 279 U. S. 597	18, 22, 23, 24, 26, 27, 29
Bijur v. *Bendix*, 285 Fed. 974 (App. D. C.)	61
Brannan v. *State*, 94 Fla. 656, 114 So. 429	59
Chapman, in re, 166 U. S. 661	23, 25

Cases—Continued. Page

Chin Chan On, Ex parte, 32 F. (2d) 828 (W. D. Wash.) 60
Clarke, Ex parte, 100 U. S. 399 25
Combe qui tam v. *Pitt*, 1 Wm. Blackstone, 523, 96 Eng. Rep. 304 (K. B., 1764) 31, 32
Commonwealth v. *Irvine*, 14 Penn. Dist. & County Rep. 275 59
Commonwealth v. *Luckis*, 99 Mass. 431 40
Commonwealth v. *Shooshanian*, 210 Mass. 123, 96 N. E. 70 47
Dunnigan Sisters, The, 53 F. (2d) 502 (S. D. N. Y.) 42
Eckels v. *State*, 20 Oh. St. 508 39
Edwards v. *M'Leay*, 2 Vesey & Beames, 256, 35 Eng. Rep. 316 46
Fellerman, In re, 149 Fed. 244 39
Gordon, In re, 167 Fed. 239 (S. D. N. Y.) 61
Harrison v. *People*, 50 N. Y. 518 40
Henry v. *Hamilton*, 7 Blackford, 506 58
Hereford v. *People*, 197 Ill. 222 43
Hudgings, Ex parte, 249 U. S. 378 43
Johnsen v. *United States*, 41 F. (2d) 44 60
Keizo Shibata, Ex parte, 35 F. (2d) 636 (C. C. A. 9th) 61
King, The, v. *Harris*, 5 B. & Ald. 926, 106 Eng. Rep. 1430 (K. B.) 44
Leonard v. *Commonwealth*, 112 Pa. 607, 4 Atl. 220 32
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Martin v. *Miller*, 4 Mo. 47 53
Masaichi Ono v. *Carr*, 56 F. (2d) 772 ..... 20, 60, 61
McGrain v. *Daugherty*, 273 U. S. 135 ..... 18, 22, 23, 25, 28, 29
Newberry v. *United States*, 256 U. S. 232 ..... 23, 24, 25, 26, 31
Omychund v. *Barker*, 1 Atk. 21, 26 Eng. Rep. 15 39
Osaka Shosen Kaisha Line v. *United States*, Oct. Term, 1936, No. 224 36
People v. *Brill*, 100 N. Y. Misc. 92 (Gen Sess.) 57
People v. *Burden*, 9 Barb. (N. Y.) 467 (Monroe General Term) 44
People v. *Freeman*, 256 Ill. App. 233 (Chicago 1st Dist.) 53
People v. *Gillette*, 126 App. Div. 665 (New York 1st Dept.) 54, 57, 58, 60, 61
People v. *Glass*, 191 App. Div. 483 (New York 2d Dept.) 44
People v. *Hayes*, 140 N. Y. 484 42
People v. *Markan*, 123 Misc. Rep. 689, 206 N. Y. Supp. 197 58
Queen, The, v. *Holl*, 7 Q. B. Div. 575 (C. A.) 52
Reed v. *County Commissioners*, 277 U. S. 376 ..... 26, 29
Regina v. *Holl*, 45 Law Times Reports, 69 (Q. B. D. 1881) 19, 46, 49
Regina v. *Philpotts*, 5 Cox. Cr. Cas. 363 (Cr. App.) (1851) 19, 48
Rex v. *Coote*, 10 British Columbia Reports, 285 47
Rex v. *Dowlin*, Peake 227, 170 Eng. Rep. 138 (K. B. 1792) 47
Rex v. *Jones*, Peake 51, 170 Eng. Rep. 75 (Nisi Prius, King's Bench, After Hilary Term, 31 Geo. III, 1791) 46, 47

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Rex v. *Knill*, 5 B. & Ald. 929, 106 Eng. Rep. 1431 (K. B.) 44
Rex v. *Poynton*, 9 Cox. Cr. Cas. 249 (Cr. App. 1862) 39
Rex v. *Rowley*, 1 Mood. 111, 168 Eng. Rep. 1205 (Crown Cases Reserved, 1825) 47
Rex v. *Simmons*, 8 Car. & P. 50, 173 Eng. Rep. 394 43
Rex v. *Thorogood*, 8 Mod. 179, 88 Eng. Rep. 131 (Common Pleas, 1723) 44, 48
Roy v. *Carr*, 1 Siderfin, 418, 82 Eng. Rep. 1191 (K. B., Trinity Term, 21 Chas. II, 1669) 45, 46
Seymour v. *United States*, 77 F. (2d) 577 12, 26, 32, 34, 60
Siebold, Ex parte, 100 U. S. 371 25
Sinclair v. *United States*, 279 U. S. 263 23, 25
Smiley v. *Holm*, 285 U. S. 355 25
State ex rel. Brady v. *Bates*, 102 Minn. 104, 112 N. W. 1026 32
State ex rel. Smith v. *Marsh*, 120 Neb. 287 8
State v. *Scott*, 64 N. C. 586 39
State v. *Von Buren*, 7 Boyce (30 Del.) 79 39
Thrasher v. *State*, 31 Okla. Cr. 95, 237 Pac. 139 35
United States v. *Mosley*, 238 U. S. 383 25
United States v. *Pettus*, 84 Fed. 791 (C. C., W. D. Tenn.) 43
United States v. *Wood*, 14 Pet. 430 44
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Vernon v. *North* (unreported), referred to in Holdsworth, *History of English Law*, Vol. IV, p. 517, note 3 20, 48
Wiesebrock, In re, 188 Fed. 757 (E. D. N. Y.) 60
Williford v. *State* 185 S. E. 611 (Ga. 1936) 43
Yarbrough, Ex parte, 110 U. S. 651 25

Statutes:

Constitution:
Seventeenth Amendment 24
Art. I, Sec. 5 Cl. 1 25
Act of April 3, 1790, § 18, c. 9, 1 Stat. 116 36
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Criminal Code, Sec. 125 (U. S. C., Title 18, Sec. 231) 2, 28
Idaho Sess. Laws, 1909, Sec. 24, p. 196 32
Nebraska Comp. St. (1922) § 2114, as amended by Nebraska Laws 1925, c. 108, § 1 8
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Perjury Act of 1911, 1 and 2 Geo. V, c. 6, 17 Chitty's Statutes, 6th ed., p. 61 37
2 Geo. II, c. 24 (1729), Secs. 7 and 8 31
R. S. Sec. 101, U. S. C., Title 2, Sec. 191 28

Miscellaneous:

Page

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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 600

THE UNITED STATES OF AMERICA, PETITIONER

v.

GEORGE W. NORRIS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The charge of the trial court appears at R. 39–48. The opinion of the Circuit Court of Appeals (R. 51–60) is reported in 86 F. (2d) 379.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 19, 1936 (R. 60). The petition for writ of certiorari was filed on December 24, 1936, and was granted on February 1, 1937 (R. 60). The jurisdiction of this Court is invoked

under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, and under Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the Senate Committee was competent to institute, and to exact evidence in, the inquiry in which respondent testified.

2. Whether there was a "*law*" of the United States authorizing an oath to be administered in that inquiry.

3. Whether the questions to which respondent gave the Senate Committee false answers were material to the inquiry in which respondent testified.

4. Whether the respondent ceased to be a perjurer by retracting his false testimony the day after it had been given and he had left the stand.

STATUTES INVOLVED

(1) Section 125 of the Criminal Code, U. S. C., Title 18, Sec. 231, provides:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material

matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than $2,000 and imprisoned not more than five years.

(2) Senate Resolution No. 215, 71st Cong., 2d Sess., 72d Cong. 6841–6842:

Resolved, That a special committee consisting of five Senators, to be appointed by the Vice-President, is hereby authorized and directed to investigate the campaign expenditures of the various candidates for the United States Senate, the names of the persons, firms, or corporations subscribing, the amount contributed, the method of expenditure of said sums, and all facts in relation thereto, not only as to the subscriptions of money and expenditures thereof but as to the use of any other means or influence, including the promise or use of patronage, and all other facts in relation thereto which would not only be of public interest but which would aid the Senate in enacting any remedial legislation or in deciding any contest which might be instituted involving the right to a seat in the United States Senate.

The investigation hereby provided for, in all the respects above enumerated, shall apply to candidates and contests before senatorial primaries, senatorial conventions and the contests and campaign terminating in the general election in November 1930.

No Senator shall be appointed upon said committee from a state in which a Senator is to be elected in the general election in 1930.

Said committee is hereby authorized to act upon its own initiative and upon such information as in its judgment may be reasonable or reliable. Upon complaint being made before said committee under oath by any person, persons, senatorial candidate, or political committee, setting forth allegations as to facts which under this resolution it would be the duty of said committee to investigate, the said committee shall investigate such charges as fully as though it were acting upon its own motion, unless after a hearing upon such complaint the committee shall find that the allegations in said complaint are immaterial or untrue.

Said committee is hereby authorized in the performance of its duties to sit at such times and places, either in the District of Columbia or elsewhere, as it deems necessary or proper. It is specifically authorized to require the attendance of witnesses by subpoena or otherwise; to require the production of books, papers, and documents; and to employ counsel, experts, clerical, and other assistants; and to employ stenographers at a cost not exceeding 25 cents per one hundred words.

Said committee is hereby specifically authorized to act through any subcommittee authorized to be appointed by said committee. The chairman of said committee or any member of any subcommittee may administer oaths to witnesses and sign subpoenas for witnesses; and every person duly summoned before said committee, or any

subcommittee thereof, who refuses or fails to obey the process of said committee or who appears and refuses to answer questions pertinent to said investigation shall be punished as prescribed by law.

The expenses of said investigation, not exceeding in the aggregate $100,000, shall be paid from the contingent fund of the Senate on vouchers signed by the chairman of the committee or the chairman of any subcommittee.

All hearings before said committee shall be public and all orders or decisions of the committee shall be public.

The committee shall make a full report to the Senate on the first day of the next session of the Congress.

STATEMENT

In this case the point of principal inquiry is whether a proper charge was given to a jury trying the respondent for alleged perjury before a Senate Committee.

On April 10, 1930,[1] the Senate of the United States passed Senate Resolution No. 215, 71st Con-

[1] Observe that this date was at least one month before the respondent considered being a candidate either for a state or national office. His first thought of running for any office was in May 1930 (R. 25–26). His first political action was on June 25, 1930, when he sent to the County Treasurer's office an application, accompanied by a filing fee, in order to appear on the ballot in the election for Railway Commissioner for the State of Nebraska (R. 34).

gress, 2d Session, 72 Cong. Rec. 6841–6842 (which is printed in full at R. 1–2, and which was appropriately introduced in evidence, R. 20–21). Under its terms the Vice-President was—

> authorized and directed to investigate the compaign expenditures of the various candidates for the United States Senate, the names of the *persons,* firms, or corporations *subscribing,* the *amount contributed,* the method of expenditure of said sums, and *all facts in relation thereto,* not only as to the subscriptions of money and expenditures thereof but as to the use of any other means or influence, including the promise or use of patronage, and all other facts in relation thereto which would not only be of public interest but which would aid the Senate *in enacting any remedial legislation* or *in deciding any contest* which might be instituted involving the right to a seat in the United States Senate.
>
> The investigation hereby provided for, in all the respects above enumerated, *shall apply to candidates and contests before senatorial primaries,* senatorial conventions and the contests and campaign terminating in the general election in November 1930. [Italics added.]

The Committee so appointed was "specifically authorized to require the attendance of witnesses by subpoena or otherwise" and was further—

> specifically authorized to act through any subcommittee authorized to be appointed by said committee. The chairman of said

> committee or any member of any subcommittee may administer oaths to witnesses and sign subpoenas for witnesses; and every person duly summoned before said committee, or any subcommittee thereof, who refuses or fails to obey the process of said committee or who appears and refuses to answer questions pertinent to said investigation shall be punished as prescribed by law.

The official records of the Senate show that the Vice-President duly appointed a Committee which, as finally composed, consisted of Senator Gerald P. Nye, of North Dakota; Senator Porter H. Dale, of Vermont; Senator C. C. Dill, of Washington; Senator Roscoe C. Patterson, of Missouri; and Senator Robert F. Wagner, of New York. (R. 21–22.) This Committee, pursuant to the resolution under which it was established, unanimously authorized Senator Nye, the Chairman, "to act as a sub-committee and to appoint a subcommittee of one or more members to hold hearings as in his judgment was desirable" (R. 24). Acting as a sub-committee (R. 25), Senators Nye and Dale, after several preliminary meetings (R. 24), met on September 22, 1930, in the Federal Building in Lincoln, Nebraska.[2] (R. 24.)

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[2] The resolution had provided:

"Said committee is hereby authorized in the performance of its duties to sit at such times and places, either in the District of Columbia or elsewhere, as it deems necessary or proper."

At the time of this meeting, the Nebraska primary election of August 12, 1930 (R. 22, 32) had already been held; but there had not yet been held the general Senatorial election of November 1930 (R. 21). For that primary election, several applications for the Republican primary had been filed. Senator George W. Norris of McCook, Nebraska (hereinafter referred to as Senator Norris), had duly filed on January 11, 1930 his application (R. 22); and one W. M. Stebbins had duly filed on November 12, 1929 his acceptance of nominating petitions previously filed on his behalf (R. 23). The respondent had also attempted to file on July 5, 1930 [*State ex rel. Smith* v. *Marsh*, 120 Neb. 287, 288] an application for the same primary, but the Supreme Court of Nebraska ruled that this application "was not filed * * * within the time required by law"[3] and ordered the Secretary of State of Nebraska "to omit [the name of the respondent] from the list of candidates for United States Senator of Nebraska, certified by him to the various county clerks and election commissioners." (R. 32.) *State ex rel. Smith* v. *Marsh*, 120 Neb. 287, 295.

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[3] Under Nebraska law it was requisite that the application, to be effective, should be filed 40 days prior to the primary election. Neb. Comp. St. (1922) § 2114, as amended by Neb. Laws 1925, c. 108, § 1; Neb. Comp. St. (1929) § 32–1124. The respondent's attempted application was only 38 days prior to that date.

Knowing these facts, the Committee, attended by its Secretary (R. 23–24) and its official stenographer (R. 25–27), on September 22, 1930, called the respondent and swore him as a witness (R. 25). The respondent then stated under oath that "he was going to tell the truth and the whole truth." (R. 37.) On the morning of the twenty-second, he told the Committee something of his background (R. 25), discussed his original intention to run for railway commissioner of the State of Nebraska (R. 26); and then "testified he did not file for railway commissioner because he thought about filing for United States Senator" (R. 26). The Committee recessed, and returned in the afternoon (R. 26). At that time the following colloquy took place between the examiner and the respondent (R. 26):

> Q. Now what assurance did you have of financial support and backing?
>
> A. None whatever.
>
> Q. In your campaign?
>
> A. None whatever.
>
> * * * * *
>
> Q. Did you get any assurance from anybody that they would help you—Republican, Democrat, independents, or anybody say they would help to finance your campaign?
>
> A. No, sir.
>
> * * * * *
>
> Q. Did you receive any money from anybody in the campaign?
>
> A. I did not.

These answers were false, and intentionally so. The respondent himself has admitted "that these answers were not true" (R. 36). He "knew at the time of testifying he had received $500.00 and the $50.00 and what he was saying was not true." (R. 37.) During the whole examination on this day the respondent did not endeavor to correct, explain, or qualify the answers just set forth. He "concluded his testimony about four o'clock in the afternoon" (R. 33), although the subcommittee continued listening to other evidence, and "on the evening of September 22 they adjourned at 4:40 P. M. until 10:00 A. M. of September 23, 1930." (R. 26.) So far as appears, the Committee never expected or asked the respondent to return to the stand.

When the Committee resumed its hearings the next day, seven other witnesses took the stand (R. 33). At least one of them, A. Paul Johnson, flatly contradicted the respondent's falsehoods and made "changes" in the respondent's story (R. 38). Johnson told the Committee, as he subsequently told the jury in the case at bar (R. 27–30), what the facts really were.

As shown in the evidence in the case at bar, Johnson, together with three confederates, Victor Seymour, Hugh Drake and Oscar Drake, on Sunday, June 29, 1930, had met at the Fort Kearney Hotel, Kearney, Nebraska. The Drakes were local persons (R. 27), but "Seymour said he had a prom-

inent place in the Republican party" (R. 29). Pursuant to a plan devised at that hotel, Seymour gave Johnson $50 in currency, and Johnson, on the next day, Monday, June 30, approached the respondent and requested him "not to file as a candidate for Railway Commissioner, but to file for the United States Senate" (R. 27). Johnson told the respondent that if he were willing to accept this suggestion, "the Republican party would support him" and "would be behind him"; Johnson would immediately deliver to him the "$50.00 in currency [given to Johnson by Seymour] to pay his filing fee"; "his campaign expenses would be paid estimated at $500.00; that he would be taken care of, and if he did not withdraw within the period that the law required, he would be delivered another $500.00."[4] (R. 28.)

Johnson has testified that nothing "was done with this $50.00 on June 30, 1930 [that is, the $50 which Seymour had given him the day before], but on July 2, 1930, witness stated that he delivered the identical $50.00 to Norris," the respondent (R. 28). The next day, in addition to this $50, Johnson gave to the respondent a $500 bond (R.

[4] As to the promise of this second $500, there may be some doubt, although the jury does not appear to have felt any. The respondent has "said that A. Paul Johnson did not tell him he would give him another $500.00 if he would not withdraw as a candidate for United States Senator" (R. 36). However, this minor variation is of no consequence inasmuch as respondent has admitted the facts with respect to the first $500.00 and the $50.00. (R. 35, 38.)

28) which Johnson had received through the mail (R. 28), after a telephone conversation with Seymour (R. 30). [Compare *Seymour* v. *United States*, 77 F. (2d) 577, 583 (C. C. A. 8th).]

It is not denied that this testimony of Johnson in the instant case is, with one minor exception,[5] substantially the same as the testimony which he gave before the Senate sub-committee on September 22 and 23, 1930. And as Johnson was giving his testimony to that Senatorial tribunal, the respondent listened to it. Indeed he accepted from the Chairman of the Committee an invitation to "come down and have a chair near Mr. Johnson, because I want you to hear what he is saying." (R. 33.)

Having heard, in the presence of this tribunal, a direct refutation of the tale he had spun for them the previous day (R. 37), the respondent, after consulting with his own counsel, of his own motion asked, and was granted, permission to return to the stand (R. 36). On his voluntary return, the respondent and the examiner had the following colloquy (R. 38):

> Q. Now, Mr. Norris, do you want the story that you have told us of your entire connection with this campaign to stand as your story?
>
> A. Outside of I might make a few changes in it, the same as Mr. Johnson has. He did

[5] In September 1930 Johnson did not implicate Seymour in the scheme (R. 30).

give me $50, and on going back to Missouri I mailed back to him the $50. I got a bank draft and mailed it back to him after I got my commission check.

Q. Mailed it back to whom?

A. Mr. Johnson.

Q. You thought, then, Mr. Johnson was paying this $50?

A. I borrowed it.

Q. You borrowed it? Didn't you hear his testimony that someone had given him that money to give you?

A. No; besides that.

Q. You had borrowed something in addition to that filing fee, $50?

A. Yes, sir.

Q. From Mr. Johnson?

A. Yes, sir.

Q. You sent that back to him?

A. You will find the transaction there.

Q. But you never made any reimbursement of the $50 you got for the filing fee?

A. No, sir; I never paid him that back.

A. [*sic*] Now, what other changes would you want to make in the story you have told us?

A. I believe that is all. I would like to go on tomorrow and make some changes.

Q. Let us make whatever changes are needed there, and if you have made any untruthful statements today surely you know what they are and can correct them now.

A. You mean yesterday?

Q. Yesterday.

A. Do you have a copy of that there?

Q. No; we don't have a copy of that.

A. That is all that I know, outside of——

Q. That is all that you know? Now, what of this $500 that was given you?

A. That was given to me by Mr. Johnson and cashed at North Platte with my brother.

Aware of the direct contradictions in the testimony of the respondent before the Senate Committee, the grand jury in the Lincoln Division of the District of Nebraska in the Eighth Judicial Circuit on June 23, 1931, indicted the respondent for perjury under Section 125 of the Criminal Code, U. S. C., Title 18, Sec. 231. (R. 1–8.) On the actual trial the facts were proved by duly authenticated official records (R. 20–23, 24, 32–33) and by the testimony of John Andrews, the Secretary to the Senate Committee on Campaign Expenditures (R. 23–25); William M. Day, the official stenographer to the Committee (R. 25–27, 33–34); Frank Healy, a special assistant to the Committee (R. 31); A. Paul Johnson, who handed the money to the respondent (R. 27–31); and Victor Seymour, who supplied Johnson with the money (R. 31–32).

Moreover, the respondent himself took the stand (R. 34–37), admitted that he had been promised "support if he filed for the United States Senator and so decided to run for the Senate" (R. 35); that he had received from Johnson the $50 filing fee and the $500 bond (R. 35); that he had the $500 bond "wired * * * to him by Western Union to Estes Park where he got the money and where he spent about a week on a vacation" (R. 36); and

finally that he "knew at the time of testifying [before the Senate Committee that] he had received $500.00 and the $50.00 and what he was saying was not true." (R. 37.)

In his charge the District Judge told the jury (R. 40):

> Even though the defendant testified falsely, that is not sufficient to convict him, nor would it be sufficient that he testified falsely but did so carelessly, or negligently, or hastily, but it must appear that he testified falsely and so testified intentionally and that he did not believe this testimony was true when he gave it.

And, when he came to discuss the testimony that the respondent on September 23 had retracted what he had said on September 22, the District Judge commented as follows[6] (R. 47):

> As to this testimony you are instructed that this testimony may be considered by you along with the other evidence on the question of whether or not considering what the defendant testified on the day prior and his act of testifying again the following day and what he said in his testimony, the defendant wilfully, that is, intentionally testified falsely in his testimony on the day before in the matters charged against him.

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[6] It may incidentally be remarked that in our opinion, in view of the respondent's flat admission that on September 22 he lied and knew he was lying (R. 37, 36), this charge was, if anything, too favorable to the respondent. See footnote 15, page 35, *infra*.

The District Judge, over exception, refused the following, among other, instructions requested by the respondent (R. 49):

> 4. The Jury are instructed that even if you find that the defendant in this case made false answers to the questions which were put to him at the hearing before the Senate Committee in question, and if you also find that while this hearing was yet continuing and while the matter was yet pending before the Senate Committee, the defendant corrected any erroneous or false statements that were made, if any, then you will find the defendant not guilty. (Refused. Defendant excepts.)
>
> * * * * *
>
> 6. The Jury are instructed that if you find the defendant, in the latter portion of his examination before the Senate Committee, corrected statements that may have been incorrect or even intentionally false, made prior to the correction of the defendant, then you will find the defendant not guilty. (Refused. Defendant excepts.)

The jury returned a verdict of guilty (R. 12), and the court imposed a sentence of a fine of $100 and imprisonment for three months (R. 14–15). The respondent appealed to the Circuit Court of Appeals (R. 15–16), and that court reversed the judgment (R. 60). In its opinion, after quoting (R. 53) the respondent's two requested charges which we have just quoted, the court held that, although part of the requested charges was "ambigu-

ous and not clear", another part "correctly states the law" (R. 58). The Circuit Court of Appeals then held that the following would have been an appropriate charge and that failure to grant some such charge was reversible error (R. 58):

> The jury are charged that the law encourages the correction of erroneous and even intentionally false statements made by a witness upon a trial or hearing, and so, if you shall find and believe from the evidence that defendant made false answers to the questions or any of them which were put to him at the hearing before the Senate subcommittee (which questions are set out in the indictment and which questions the court has already in this charge called specifically to your attention), yet that defendant, while the hearing was continuing and unfinished again took the witness stand and then and there fully corrected all erroneous or false statements, if any, which had theretofore been made by him in answer to said questions, you should find the defendant not guilty.

The Government on December 24, 1936, filed a petition for certiorari which was granted on February 1, 1937.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Eighth Circuit erred:

1. In holding that the trial court erred in refusing to submit to the jury the question whether

respondent had fully and fairly retracted and corrected his original false testimony.

2. In reversing the judgment of the United States District Court for the District of Nebraska.

SUMMARY OF ARGUMENT

The testimony upon which the respondent was convicted of perjury was given by him before a tribunal competent to exact evidence. That tribunal was a Senate Committee constituted and acting pursuant to S. Res. No. 215, 71st Cong., 2nd Sess. This resolution had its constitutional foundation in the right of Congress to institute inquiries and exact evidence with respect to possible exercises of either its power to enact legislation (*McGrain* v. *Daugherty*, 273 U. S. 135, 173) or its power to judge of the elections of its own members (*Barry* v. *United States ex rel. Cunningham*, 279 U. S. 597). In an inquiry carrying out the terms of that resolution, the members of the Committee were by "a law of the United States" authorized to administer the oath taken by the respondent. R. S. Sec. 101. Moreover, the questions asked of the respondent, and the willfully false answers given by him were material and pertinent to that inquiry. Thus the only important issue in this case is whether the respondent is entitled to escape the pains and penalties of the perjury statute, Section 125 of the Criminal Code, on the ground that he retracted his false testimony the day after it had been given and he had left the stand.

The perjury statute does not create an exception or immunity for a witness who recants false testimony which he has deliberately given, and which he has allowed to stand until other witnesses have exposed his falsehoods. Moreover, it would be against sound public policy to read such an exception into the statute. An insistence upon truth at every stage of a lawful inquiry is necessary not merely to protect whatever substantive interests may be at stake, but also to insure expeditious procedure in the tribunal conducting the inquiry. There is no likelihood that the grant of an immunity such as is claimed on behalf of the respondent will lead a witness who has deliberately lied to tell the truth later. Indeed such grant is more likely to tempt a knave to tell a falsehood in the first place and wait to see if he is detected.

On the doctrine of avoidance of perjury by subsequent recantation there is no decision or dictum in this Court. The English law does not recognize this doctrine in cases where the original false statement was deliberate and unequivocal. *Reg.* v. *Holl,* 45 Law Times Reports 69 (Q. B. D., 1881). *Reg.* v. *Philpotts,* 5 Cox. Cr. Cas. 363 (1851). The prevailing view in the American state courts does not apply the doctrine unless the original falsehood was due to ambiguity, inadvertence, or accidental error. And no case here or abroad regards perjury as undone where not only the original falsehood was clear and deliberate,

but also where the retraction did not come until after the witness had left the stand and other witnesses had exposed him. *Masaichi Ono* v. *Carr*, 56 F. (2d) 772 (C. C. A. 9th).

ARGUMENT

INTRODUCTORY

A person can be properly indicted and convicted under Section 125 of the Criminal Code only if it is proved (1) that he has "taken an oath before a competent tribunal," (2) that the proceeding in which he took the oath was one "in which a law of the United States authorizes an oath to be administered," (3) that in the course of his testimony he stated a "material matter," and (4) that at the time he made the statement he "willfully and contrary to such oath" did "not believe [the statement] to be true."[7]

The respondent contends that the first three elements are lacking in this case. He argues (1) that the Senate Committee was not competent to institute, and to exact evidence in, the inquiry in which he testified (Br. Opp. 17–20), (2) that there was no *law* of the United States authorizing an oath to be administered in that inquiry (Br. Opp. 22–23), and (3) that the questions to which he answered falsely

[7] Observe that the issue is not whether the statement is false, but whether the person who testified believed it to be false. *Allen* v. *Westley*, Hetley 97, 124 Eng. Rep. 372 (1629); *Vernon* v. *North* (unreported), referred to in Holdsworth, *History of English Law*, Vol. IV, p. 517, note 3; see page 48, *infra*.

were not material to that inquiry (Br. Opp. 17–20). The respondent does not and, in view of his own evidence in the case at bar (R. 37, 36), could not, argue that at the time he gave the answers he believed that they were true.

However, the respondent does make a fourth contention: to wit, that even if he once was guilty of perjury within the exact words of the statute, he ceased to be a perjurer by retracting his false testimony the day after it had been given and he had left the stand.

We shall discuss each of these four issues, although on the first three our argument will be brief inasmuch as they were decided in favor of the Government by the court below; and inasmuch as they are invoked in this Court not by the petition for certiorari but by the respondent's brief in opposition as alternative supports for the judgment rendered below. (Br. Opp. 16.)

I

THE SENATE COMMITTEE WAS COMPETENT TO INSTITUTE, AND TO EXACT EVIDENCE IN, THE INQUIRY IN WHICH THE RESPONDENT TESTIFIED

The Senate Committee before whom the respondent testified was constituted under the authority of Senate Resolution No. 215, 71st Congress, 2d Session, passed April 10, 1930. 72 Cong. Rec. 6841–6842. This resolution directed the Committee "to investigate the campaign expenditures of

the various candidates for the United States Senate * * * and all facts in relation thereto * * * which would *not only* be of public interest *but* which would aid the Senate in enacting any remedial legislation or in deciding any contest which might be instituted involving the right to a seat in the United States Senate." [Italics added.]

This resolution (in purpose and language strikingly similar to S. Res. 195, 69th Cong., 1st Sess., passed May 19, 1926, 67 Cong. Rec. 9677–9678, considered in *Barry* v. *United States ex rel. Cunningham*, 279 U. S. 597) does not, as the respondent suggests (Br. Opp. 18), authorize the Committee to ascertain facts merely on the ground that they are of public interest.[8] Compare *McGrain* v. *Daugherty*, 273 U. S. 135, 180 (first paragraph). The Committee is limited to such investigations of campaign expenditures of candidates for the United States Senate and such related facts of public interest as would not only be of public interest but would also "aid the Senate in enacting any remedial legislation or in deciding any contest

[8] Of course the resolution does not direct an *ad hominem* investigation of the conduct of the respondent himself. On April 10, 1930, when the resolution was passed, probably no Senator had ever heard of the respondent, and indeed the respondent had never considered engaging in any political activity. See footnote 1, page 5, *supra*.

which might be instituted involving the right to a seat in the United States Senate." Thus the Resolution proceeds upon two alternative constitutional bases, each of which has already been approved by this Court. That is to say, either House of Congress may institute inquiries and exact evidence with respect to possible exercises of either its power to enact legislation (*Sinclair* v. *United States*, 279 U. S. 263, 291; *McGrain* v. *Daugherty*, 273 U. S. 135, 173; *In re Chapman*, 166 U. S. 661, 671) or its power to judge of the elections of its own members. (*Barry* v. *United States ex rel. Cunningham*, 279 U. S. 597, 613.)

While the respondent admits that for either of these two ends, either House of Congress may constitutionally institute an inquiry and exact evidence, he asserts that neither end was properly invoked in the Resolution under review.

He first contends that legislation could not have been the objective of the inquiry since, as he says, "Congress has no power to legislate for the purpose of regulating primary elections." (Br. Opp. 18.) It is extremely doubtful whether this statement is true. Although without the authority of and prior to the Seventeenth Amendment Congress could not by criminal penalties directly regulate a primary election for United States Senator (*Newberry* v. *United States*, 256 U. S. 232, 254) this Court has never held that the situation is the

same with respect to action taken after the effective date of that amendment.[9]

Moreover, even if Congress could not directly regulate the primary elections, it could enact legislation which would incidentally take into account those primaries. Thus it could punish Federal officials who practiced corruption in such contests. *United States* v. *Wurzbach,* 280 U. S. 396. And it does not appear that Congress could not limit participation in a congressional election to persons and parties that had been free from corruption, trickery, or shabby practices in an immediately

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[9] In the *Newberry* case, *supra*, Mr. Justice McReynolds who delivered the opinion of the Court, in which Justices Holmes, Day, and Van Devanter concurred, while adverting to the Seventeenth Amendment (pp. 250, 251, etc.) seems to have put it out of consideration in that case on the ground that the authority there conferred had not been exercised by "appropriate legislation" (pp. 254–255). Mr. Justice McKenna, in his concurrence, explicitly "reserves the question of the power of Congress under that Amendment" (p. 258). Chief Justice White was of opinion that (particularly in view of the legislative history in which Senator Sutherland played so prominent a part) the Seventeenth Amendment gave Congress power to regulate primary elections for United States Senators (pp. 263–269). And Mr. Justice Pitney's dissent in which Justices Brandeis and Clarke concurred, proceeds on reasoning which would clearly make valid a congressional statute enacted pursuant to the Seventeenth Amendment and designed to regulate senatorial primaries (pp. 285–286): On this whole point, see the argument of Mr. Wickersham in *Barry* v. *United States ex rel. Cunningham*, 279 U. S. 597, 603. But see a loose reference to the *Newberry* case by Holmes J. in *United States* v. *Wurzbach*, 280 U. S. 396, 398.

preceding primary. Finally, it may be noted that since practices adopted in a primary (particularly practices such as the respondent's) are likely to be repeated or copied in the ensuing or a subsequent congressional election, a Congressional committee might justifiably inquire into primary election practices as an aid to preparing comprehensive legislation on congressional elections as to which it admittedly has regulatory power. *Ex parte Siebold,* 100 U. S. 371; *Ex parte Clarke,* 100 U. S. 399; *Ex parte Yarbrough,* 110 U. S. 651, 661–662; *United States* v. *Mosley,* 238 U. S. 383. Compare *Smiley* v. *Holm,* 285 U. S. 355; *Newberry* v. *United States,* 256 U. S. 232. "We cannot assume on this record that the action of the Senate was without a legitimate object; * * * it was certainly not necessary that the resolutions should declare in advance what the Senate meditated doing when the investigation was concluded." *In re Chapman,* 166 U. S. 661, 669–670; *McGrain* v. *Daugherty,* 273 U. S. 135, 178.

Quite independently of potential legislative action, potential judicial action justified the Senate in passing Resolution No. 215, and, what is more important, justified the Committee in proceeding, pursuant to that Resolution, to exact evidence from the respondent even as late as September 22, 1930. Under the Constitution the Senate has "the power to judge of the elections, returns and qualifications of its own members. Art. I, § 5, cl. 1.

'That power carries with it authority to take such steps as may be appropriate and necessary to secure information upon which to decide concerning elections.' *Reed* v. *County Commissioners,* 277 U. S. 376, 388." *Barry* v. *United States ex rel. Cunningham,* 279 U. S. 597, 613; *Seymour* v. *United States,* 77 F. (2d) 577, 580 (C. C. A. 8th). Now it is true that by September 1930 it was unlikely, though perhaps not impossible,[10] that the respondent would ever present to the Senate credentials of his election. But it was by no means clear that the man who did present himself from Nebraska would not have been implicated in such tricky, corrupt, "sinister", or "malign" practices as to be unworthy of a seat in the Senate. *Barry* v. *United States ex rel. Cunningham,* 279 U. S. 597, 615; *Newberry* v. *United States,* 256 U. S. 232, 258, 284. When the Committee met in September, the election was still two months away. No one knew who would win. Before the Committee actually made inquiry of the respondent it was reasonable to suppose that his campaign had been financed

[10] By September it was obvious that the respondent would not be the Republican nominee. He had been ruled off the ballot by the State Court; and the primary, which had taken place on August 12, 1930, without his name appearing, had resulted in a victory for Senator George W. Norris of McCook. Yet, it was possible that the respondent might repeat his shabby trick by running, and perhaps achieving success, as an independent in the election itself.

not by the Republican party or by some defeated Republican aspirant like Stebbins, but had been financed by the Democratic party or even by the successful candidate in the Democratic primary. The Democratic candidate might justifiably have concluded that he could win only if his Republican opponent was someone other than Senator Norris; and that the only way to prevent the Senator's renomination was to finance the respondent. That this argument is not attenuated, but is based on a possibility in the mind of the Senate investigating Committee, is shown by the record. When the respondent was on the stand, and engaged in the very colloquy which embraced the alleged perjury, he was asked by the Committee (R. 26):

> Did you get any assurance from anybody that they would help you—Republican, *Democrat,* independents, or anybody say they would help to finance your campaign? [Italics added.]

Thus the inquiry was designed to disclose whether a candidate still in the race for Senator had participated in the respondent's trickery.

From the foregoing it is clear that the Senate had the power to institute the inquiry and exact the testimony provided for in Resolution 215. It also had the right to devolve upon a committee of its members (or a part of that committee) this authority to investigate, to examine witnesses and to report. *Barry v. United States ex rel. Cunning-*

ham, 279 U. S. 597, 613; *McGrain* v. *Daugherty,* 273 U. S. 135, 168. It follows that the Committee before whom the respondent testified was, within the meaning of the perjury statute (i. e., Section 125 of the Criminal Code), "a competent tribunal."

II

A LAW OF THE UNITED STATES AUTHORIZED AN OATH TO BE ADMINISTERED IN THE INQUIRY IN WHICH THE RESPONDENT TESTIFIED

The respondent suggests that the oath administered to the respondent was an oath authorized merely by the resolution of a single house of Congress, and was not authorized by "law" (Br. Opp. 23). This argument is plainly without merit. The oath was authorized not only by Resolution 215, but also by the Act of June 26, 1884, c. 123, 23 Stat. 60; R. S. § 101; U. S. C., Title 2, Sec. 191, which provides:

> The President of the Senate, the Speaker of the House of Representatives, or a chairman of a Committee of the Whole, or of any committee of either House of Congress, is empowered to administer oaths to witnesses in any case under their examination. Any Member of either House of Congress may administer oaths to witnesses in any matter depending in either House of Congress of which he is a Member, or any committee thereof.

Under this statute the chairman and members of a Congressional committee are empowered by law to administer oaths to witnesses before the committee. *McGrain* v. *Daugherty*, 273 U. S. 135, 167–168; *Reed* v. *County Commissioners*, 277 U. S. 376, 381; *Sinclair* v. *United States*, 279 U. S. 263, 291. They are therefore as competent to administer oaths to congressional witnesses as clerks of court to witnesses in court.

III

THE QUESTIONS TO WHICH RESPONDENT ANSWERED FALSELY WERE MATERIAL TO THE INQUIRY IN WHICH RESPONDENT TESTIFIED

The respondent, in an argument which, as the lower court said (R. 54), "involves the most attenuated casuistry," suggests (Br. Opp. 20–22) that the questions asked of him by the Senate Committee and the willfully false answers given by him were not material or pertinent to the inquiry authorized by Senate Resolution 215.

"When evidence is taken by a committee, the pertinency of questions propounded must be determined by reference to the scope of the authority vested in the committee by the Senate." *Barry* v. *United States ex rel. Cunningham*, 279 U. S. 597, 613. In the case at bar the Senate vested in its select committee authority—

> to investigate the campaign expenditures of the various candidates for the United States Senate, the names of the persons, firms, or

> corporations subscribing, the amount contributed, the method of expenditure of said sums, and all facts in relation thereto, not only as to the subscriptions of money and expenditures thereof but as to the use of any other means or influence, including the promise or use of patronage, and all other facts in relation thereto which would not only be of public interest but which would aid the Senate in enacting any remedial legislation or in deciding any contest which might be instituted involving the right to a seat in the United States Senate.

Thus the principal subjects of investigation were the "campaign expenditures," the campaign subscriptions, and "*all facts in relation thereto,*" of "the various candidates for the United States Senate."

The respondent argues that *he* was not a "candidate for the United States Senate," and not engaged in any campaign (Br. Opp. 20–21), inasmuch as he merely unsuccessfully and belatedly endeavored to make an application to run in the Republican primary of August 12, 1930. It is, we submit, of no consequence whether the respondent was or was not a "candidate" or was or was not engaged in any "campaign." The sinister conduct in which he was participating looked *on its face* as though it might have been promoted by the expenditures of another person who undoubtedly was a "candidate" engaged in a "campaign." See

pp. 26–27, *supra*. Until questions as to this conduct and its surrounding circumstances were asked and answered, no one could tell what was the true situation. Thus the questions were material to the inquiry.

Furthermore, the truth is that the respondent was a "candidate" for the United States Senate engaged in a "campaign" for that office. As the King's Bench, speaking through Lord Mansfield, has held [10a] and as this Court seems to have recognized,[11] "any one is a candidate for whom a vote is

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[10a] *Combe qui tam* v. *Pitt*, 1 Wm. Blackstone, 523, 96 Eng. Rep. 304 (K. B. 1764). Under an early corrupt practices act [Sections 7 and 8 of 2 Geo. II, c. 24 (1729), relating to bribery to procure any person to give his vote] a defendant was charged with a "bribe to give a vote at that election, for a person then a *candidate*" (p. 525). It was argued that the persons for whom votes were solicited were not candidates. The argument was rejected, Lord Mansfield saying (p. 524): "Before the time of election, any one is a candidate, for whom a vote is asked. This very fact makes the person in whose behalf the bribe was given a candidate." This decision is cited with approval (though with a slight error in orthography) in 1 Hawkins, *Pleas of the Crown*, p. 315, note 4.

[11] For the use of the word "candidate" by this Court, see *Newberry* v. *United States*, 256 U. S. 232, especially Mr. Reynolds J. at pages 245, 247, 257, White C. J. at pages 274–275, and Pitney J. at pages 277, 279, 286, 288, 293, 294, 295. For the use of the word "campaign" see same case, especially White C. J. at pages 274–275, and Pitney J. at pages 276, 288, 293, 294, 295. And note the use of these terms by Mr. Charles Evans Hughes, counsel for plaintiffs in error, in that case, p. 236.

asked." *Combe qui tam* v. *Pitt*, 1 Wm. Black. 523, 96 Eng. Rep. 304 (K. B. 1764).[12]

The questions propounded and the answers given were therefore clearly material and pertinent, and, under the proper practice, this conclusion could properly have been announced [13] to the jury as a matter of law. *Sinclair* v. *United States*, 279 U. S. 263, 299.

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[12] State cases in this country are in accord. In *Adams* v. *Lansdon*, 48 Idaho, 483, 505, 110 Pac. 280, in construing Section 24 of Idaho Sess. Laws, 1909, p. 196, which limited the promotion or campaign expenses of every "candidate for nomination to any office at any primary," (p. 495), the court held that a person "becomes a candidate whenever he begins to lay his plans to aid or promote his nomination" (p. 505). In *State ex rel. Brady* v. *Bates*, 102 Minn. 104, 112 N. W. 1026, in construing Section 350 of Minnesota Laws, 1895, chapter 277, p. 664, a local corrupt practices act which required the filing of an affidavit of expenditures by "a candidate for nomination or election to an elective office" (p. 106), the court held that "a person who has filed his affidavit of intention [to enter a primary] * * * has thereby become a candidate for nomination under its [the act's] terms" (p. 110). See also *Leonard* v. *Commonwealth*, 112 Pa. 607, 4 Atl. 220, 224.

[13] It is not entirely clear for just what purpose the District Judge in the case at bar discussed in his charge the meaning of the terms "candidate" and "campaign." It seems that he was considering not the issue whether the questions were "material", but whether they were "understandable" by the respondent and whether the witness had answered them truly and in accordance with his understanding. (R. 42–44.) See also the opinion of the Circuit Court of Appeals in the case at bar (R. 54–56) and in *Seymour* v. *United States*, 77 F. (2d) 577, 582–583 (C. C. A. 8th).

IV

THE RESPONDENT DID NOT CEASE TO BE A PERJURER BY RETRACTING HIS FALSE TESTIMONY THE DAY AFTER IT HAD BEEN GIVEN AND HE HAD LEFT THE STAND

There is no dispute in this case as to the facts with respect to either the respondent's original statements on September 22, 1930, when he first testified (R. 26), or his subsequent retraction on September 23, 1930 (R. 38).

On the first day there was not the slightest ambiguity in the testimony: the questions were clear; the answers unequivocal; and both taken together left nothing open to construction or misconstruction. The answers given by the respondent were (R. 36), and were intended to be (R. 37), false.[17] As he himself has said in testifying in the case at bar, he "knew at the time of testifying [before the Senate Committee] he had received $500.00 and the $50.00 and what he was saying was not true." (R. 37.) In other words, there was no mere error, inadvertence or slip due to carelessness. Having told his deliberate lies, the respondent completed his testimony, and, so far as the Committee was concerned, he was never expected or asked to return. If at this point the Senate Committee had concluded its proceedings, it can hardly be denied that the respondent would clearly have been guilty of perjury. ["When false testimony concerning a material fact has been know-

[17] The lower court agreed that "It is clear that his first answer was false, upon any view." (R. 56.)

ingly given, perjury has become and continues to be an accomplished and completed thing." *Seymour* v. *United States,* 77 F. (2d) 577, 582 (C. C. A. 8th).]

However, a night passed, and on the next day seven other witnesses testified before the Committee (R. 33). At least one of them, Johnson, flatly contradicted the respondent's falsehoods (R. 38). The respondent "heard most of the testimony" (R. 37) of these intervening witnesses and during the time Johnson in particular was testifying the respondent had accepted from the Chairman of the Committee an invitation to "come down and have a chair near Mr. Johnson, because I want you to hear what he is saying." (R. 33.)

Hearing this complete refutation of the story he had given the day previous, the respondent, after consulting with his own counsel, of his own motion asked, and was granted, permission to return to the stand (R. 36). Once back on the stand, he did not claim that the falsity of his first testimony was due to misunderstanding, or minor errors, or ambiguity. He sought and was allowed to "make a few changes in it." (R. 38.) That is, he withdrew part of what he had said, and made just such substitutions as were required in order to make his story jibe with the stories of other witnesses so far as he remembered them (R. 38).

On this state of facts, the issue of law is narrow. We are not here considering the effect of a correc-

tion of an inadvertent error or an explanation of an ambiguous statement. *Arguendo,* we may assume that where the falsity in a statement is due to inaccuracy or minor error or ambiguity, it either never was perjury, or, if it was, may not be punished if the statement is subsequently corrected or amplified. Nor are we here considering a statement made contrary to the truth, but without an intent to deceive. Of course, such a statement is not perjury either at common law or under the statute here involved. It is not made "willfully"; and it cannot be said that the statement is one which the witness does not "believe to be true." [15]

The precise issue in the case at bar is whether a witness who, having an intent to deceive, had made, as to a material matter, an unequivocally false statement, which he left unchanged throughout his examination, ceases to be a perjurer if he, after intervening witnesses have flatly contradicted him,

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[15] Under some circumstances, the fact that a witness made or was willing to make a second statement amplifying or correcting his second statement might serve as proof that he did not make the first and false statement willfully or with intent to deceive. This seems to have been the situation in *Thrasher* v. *State*, 31 Okla. Cr. 95, 237 Pac. 139, referred to by the lower court (R. 59). Indeed (too generously, we submit), the trial judge in the instant case gave the respondent the benefit of this rule by including it in his charge to the jury. (R. 47.) See page 15, *supra*. The rule really should not have been invoked since here it is not claimed that there was an absence of *mens rea* at the time the respondent first testified. From the start he knew his "answers were not true." (R. 36, 37.)

but before the proceeding has terminated, voluntarily returns to the stand, withdraws his first statement, and substitutes for it a second and entirely repugnant statement.

On this issue the words of the statute seem so clear that there is hardly room for argument. It declares that "Whoever, having taken an oath before a competent tribunal * * * that he will testify * * * truly * * * shall willfully and contrary to such oath state * * * any material matter which he does not believe to be true, is guilty of perjury * * *." The respondent asks that the prosecutor and the Court add to the statute an additional and qualifying term so as to create an exception where the witness recants the false testimony he has uttered. "This we are not at liberty to do under the guise of construction, because, as this court has so often held, where the words are plain there is no room for construction." *Osaka Shosen Kaisha Line* v. *United States,* U. S. Sup. Ct. Oct. Term 1936, No. 224, pages 2–3.

But the respondent points out (Br. Opp. 5–7) that the statute (which has long been on the books [16])

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[16] The first Federal perjury statute was the Act of April 3, 1790, c. 9, § 18, 1 Stat. 116. This legislation of the First Congress took a rather simpler form than the law we now have on the books. The present statute is, however, not materially different from the Act of March 3, 1825, c. 65, § 13, 4 Stat. 118; and is in no substantive respect different from the Act of July 12, 1876, c. 180, § 10, 19 Stat. 86, as carried forward into R. S. § 5392.

is merely a codification of the common law.[17] He then asserts, mistakenly we submit, that at common law and under statutes codifying the common law there is a "uniform rule * * * which had its origin as early as 1600" (Br. Opp. 15) that a witness may escape the pains and penalties of perjury by recanting, at any time "while the matter is yet pending" (Br. Opp. 13), such falsehoods as he has uttered. In answer we contend: first, that, *on principle,* the rule asserted is unsound and inconsistent with the common law; and second, that,

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[17] It was not until the sixteenth century that perjury in a witness was recognized as a crime punishable in other than ecclesiastical courts. Holdsworth, *A History of English Law*, Vol. 4, p. 515. "Very ancient law seems to be not quite certain whether it ought to punish perjury at all. Will it not be interfering with the business of the Gods?" Pollock & Maitland, *History of English Law*, Vol. 2, p. 541. But this early reluctance to add temporal sanctions was overcome during the realistic and effective government of the Tudors. Thus 1 Hawkins, Pleas of the Crown, c. 69, § 2, states: "Perjury by the common law seemeth to be a wilful false oath by one who, being lawfully required to depose the truth in any proceeding in a course [sic] of justice, swears absolutely in a matter of some consequence to the point in question whether he be believed or not." And Sir Edward Coke, 3 Inst. 164, in words later adopted by Blackstone, 4 Commentaries, *137, defines perjury as "a crime committed when a lawful oath is administered in some judicial proceeding to a person who swears lawfully, absolutely, and falsely in a matter material to the issue or point in question." In Great Britain at the present time the subject of perjury is covered (though not exclusively) by the Perjury Act of 1911, 1 & 2 Geo. V, c. 6, reprinted in 17 Chitty's Statutes, 6th ed., p. 61.

on authority, the rule is contrary to the English cases and the better considered American cases. We shall discuss, in turn, both the principles and the authorities; but, before doing so, we note that on the precise point at issue there is no decision or dictum in this Court; and in lower Federal courts there are decisions and dicta which support our position rather than the respondent's.

A, ON THE BASIS OF PRINCIPLE A WITNESS SHOULD NOT BE ALLOWED TO ESCAPE THE PENALTIES OF PERJURY BY RECANTING HIS FALSE TESTIMONY

It would be difficult to overemphasize the importance of not allowing a witness to go unpunished if he deliberately deviates, even for a moment, from the truth. On his veracity on the stand may depend, according to the nature of the case, life, liberty, or property. For this reason a witness is, significantly, at the very start of his testimony,[18] reminded of the awful solemnity of the occasion, and in him is at once instilled the fear both of divine and temporal retribution. Wigmore, *Evidence* (2d ed.), Vol. 3, § 1831. The oath which is customarily administered,[19] and which was administered

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[18] It is said that, unlike our practice, according to the early Roman common law the oath must close the testimony. Wharton's *Criminal Law* (11th ed.) Vol. 2, § 1572. Where the oath closes the testimony it might be proper to mete out punishment only if a falsehood had not been withdrawn.

[19] Under Federal statutes, as at common law (see 13 Halsbury, *Laws of England*, 2nd Ed., p. 748, par. 821), there is no prescribed form of oath, but in the usual and ancient form, the oath concludes with a solemn promise by the wit-

to the respondent by the Senate Committee (R. 37) forcibly reminds the witness that every detail counts, and that at every moment the evidence "shall be the truth * * * *and nothing but the truth.*"

A witness who tells a deliberate falsehood at any stage of an appropriate inquiry not only violates his solemn oath and at least momentarily endangers such life, liberty, or property as may be at stake, but he necessarily delays and hinders justice. His false testimony diverts and misleads both the court and the parties in their search for the truth. As Judge Hough pointed out in *In re Fellerman,* 149 Fed. 244, 247 (S. D. N. Y.), (a contempt case), to tell a lie to a court is a "disregard of authority, in that its jurisdiction to declare the law and ascertain and adjudicate the rights of the parties is hindered, prevented or set at naught."

Once the lie has been told, the interference with the judicial (or legislative) process, and the violation of the integrity of the oath is complete. Retraction cannot undo the damage. Nor should it prevent prosecution. Just as after a larceny is complete the thief cannot purge his guilt by immediate repentance and voluntary restitution,[20] so

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ness that the evidence to be given by him "shall be the truth, the whole truth, and nothing but the truth, so help you God." See *Omychund* v. *Barker*, 1 Atk. 21, 26 Eng. Rep. 15 (Chancery, 1744).

[20] *Rex* v. *Poynton*, 9 Cox. C. C. 249 (Ct. Cr. App. 1862); *State* v. *Von Buren*, 7 Boyce (30 Del.) 79, 82; *State* v. *Scott*, 64 N. C. 586, 587; *Eckels* v. *State*, 20 Oh. St. 508, 510.

after a deliberate lie has been told, the witness cannot purge his guilt by immediate repentance and voluntary or coerced withdrawal of his falsehood. Indeed, the evil is greater, and more clearly beyond repair, in temporary perjury than in temporary larceny. In the case of even momentary perjury the time and power of a court have been inevitably wasted; whereas if property is unlawfully taken for a moment and promptly returned, its brief absence may not have affected the property, or even been noted by its owner. Compare *Commonwealth v. Luckis*, 99 Mass. 431; *Harrison v. People*, 50 N. Y. 518.

But the respondent suggests (Br. Op. 10) that it will promote the discovery of truth to adopt a doctrine under which a witness who deliberately fabricates a tissue of lies to hoodwink a court is permitted to escape punishment if he recants after his fabrications have been exposed by intervening truthful witnesses. In the first place we doubt if such recantation, when it comes, results in any "discovery." The truth has already been discovered, the lie detected. The witness recants not in the belated hope of preventing the law doing injustice to another (Br. Op. 11), but in the desperate hope of preventing the law doing justice to him. In the second place, we doubt if the psychological effect of the suggested doctrine has been correctly portrayed by the respondent. Under the latitudinarian theory proposed, a witness who was

corrupt or who had been tampered with would be apt to tell a falsehood with greater assurance than otherwise, since he would know that if he were contradicted or exposed, he could with impunity withdraw his testimony.[21] Compare Note, 76 U. of Pa. L. Rev. 751. We submit that the fallacy of respondent's doctrine is effectively exposed by Jeremy Bentham's statement that "Of all the guarantees which contribute to the truth of testimony, legal punishment is the strongest." *Treatise on Judicial Evidence* (Dumont ed., 1825) p. 58. And at the present time, when perjury is such an obstacle to justice,[22] and conviction so difficult to secure,[23] it is doubly important not to accept a doc-

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[21] In our Petition for Certiorari, pp. 5–6, we observed that under the doctrine advanced by the respondent and the lower court, "the perjury statute is no longer an effective sanction to insure that honest testimony be given but becomes merely a procedural device through which the truthful testimony, if interposed to refute the perjury, may subsequently corroborated by the perjurer. If the perjury be uncontradicted at the hearing or trial, the perjurer may remain silent, running only the slight risk that there may be a subsequent investigation which will reveal his perjury."

[22] George H. Dession, *Perjury*, Encyclopedia of Social Sciences, Vol. XII, p. 74, notes that perjury "is at present reckoned a serious obstacle to certainty of justice." See also Purrington, *The Frequency of Perjury*, 8 Col. L. Rev. 67.

[23] See Dession, *supra*, p. 76. More recent data show that it is still extremely difficult to get the necessary evidence, and to secure the desired conviction, in a perjury trial. Thus the Annual Report of the Attorney General of the United States for the fiscal year ending June 30, 1935, p. 230, lists 35 convictions for perjury, and for the fiscal year ending June 30, 1936, p. 216, lists 62 convictions for perjury.

trine which would weaken these guarantees and enable a deliberate liar to escape penalties for the injury he has inflicted on the efficiency, dignity and integrity of the judicial process.

Of course we do not mean to say that if a witness does recant his perjury, and does so in a way that aids justice, he should be punished as severely as if he persisted in his falsehood. Undoubtedly a retraction may move a court to mitigate the punishment. And, indeed, such mitigation has precedent both in contempt cases in this country, *The Dunnigan Sisters,* 53 F. (2d) 502, 503–504 (S. D. N. Y.), and in statutes abroad. The German Civil Code, Drage, Sec. 158.

But it is not mitigation, but immunity, for which respondent asks. The doctrine for which he contends, that a deliberate falsehood cannot be punished if a correction is "made while the matter is yet pending" (Br. Op. 13), is not only unsound on its face, but also because of some of the startling corollaries which it implies. If the doctrine were sound, then no witness could possibly be prosecuted for perjury until the case in which he gave the testimony was completed, and his last chance of

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In New York State for the fiscal year 1934 there were 5 convictions for "perjury and attempts" (Annual Report of the State Commission of Correction of New York State for 1934, p. 302). In England during 1934 there were 28 convictions for perjury (Report of the Commissioner of Prisons and the Directors of Convict Prisons for the year 1934, Presented by the Secretary of State for the Home Department to Parliament by Command of His Majesty April, 1936, p. 91).

repentance gone. But this is not the law. A grand jury need not await the end of a trial in which a witness has testified falsely before indicting him for perjury. *People* v. *Hayes,* 140 N. Y. 484; *Hereford* v. *People,* 197 Ill. 222; *Williford* v. *State,* 185 S. E. 611 (Ga. 1936); *United States* v. *Pettus,* 84 Fed. 791, 792 (C. C. W. D. Tenn.); see *Ex parte Hudgings,* 249 U. S. 378, 381 (last paragraph).[24] And, *a fortiori,* a grand jury can indict one who perjures himself before a legislative committee, without waiting for the committee to reach its adjournment date, a date which might be several years ahead, and which might even be beyond the three year statute of limitations applicable to perjury. Act of Dec. 27, 1927, c. 6, 45 Stat. 51; U. S. C., Title 18, Sec. 582.

Moreover, the doctrine suggested by respondent would, as a necessary corollary, imply that if a witness in a single trial, first made an unequivocal, false statement, and later made another statement directly opposite to it, the first statement could not be made the basis of an indictment, and the second statement used as evidence. But such a corollary is unsound. It is settled that contradictory statements in the same case furnish sufficient evi-

[24] In England, it is true that the customary practice has been to postpone a prosecution for perjury until the completion of the trial in which the false testimony was given. Holdsworth, *A History of English Law.* Vol. 4, p. 517. But this practice is not due to any belief that the witness must be given an opportunity until the end of the trial to retract. *Rex* v. *Simmons,* 8 Car. & P. 50, 123 Eng. Rep. 394 (Com. Pleas, 1837).

dence to convict of perjury. *Rex* v. *Thorogood*, 8 Mod. 179, 88 Eng. Rep. 131 (Common Pleas, 1723). Compare *Rex* v. *Knill*, 5 B. & Ald. 929, 106 Eng. Rep. 1431, footnote (K. B., 1822); *People* v. *Burden*, 9 Barb. (N. Y.) 467 (Monroe General Term). See *People* v. *Glass*, 191 App. Div. 483, 485 (N. Y. 2d Dept.); *United States* v. *Wood*, 14 Pet. 430, 437–442; Wigmore, *Evidence* (2d ed.), Vol. 4, § 2043.[25]

The respondent, met with these logical difficulties in his position, turns (Br. Op. 11) to the cases in this country and in England to show that on authority, if not on principle, his position is sound. In order fully to meet this branch of his argument, we shall proceed to consider in turn (1) the English cases; (2) the cases in the state courts; and (3) the cases in the federal courts. The Federal cases are postponed because, as we have said, none of them is in this Court.

B. ON THE BASIS OF AUTHORITY A WITNESS SHOULD NOT BE ALLOWED TO ESCAPE THE PENALTIES OF PERJURY BY RECANTING HIS FALSE TESTIMONY

1. ENGLISH CASES

There is no English case which holds that a witness may escape a conviction for perjury by re-

[25] It is to be observed that as a matter of pleading in some jurisdictions, the indictment must specifically refer to the particular statement alleged to be false, and it is not enough to put both contradictory statements in the indictment and to allow the jury to choose which is false. It is said that such a course might involve double jeopardy. *The King* v. *Harris*, 5 B. & Ald. 926, 106 Eng. Rep. 1430 (K. B. 1922). But compare *People* v. *Burden*, *supra*.

canting before the end of a proceeding such willful falsehoods as he has told; and there are some cases which either hold or, at least, indicate the contrary.

Roy v. *Carr*, 1 Siderfin, 418, 82 Eng. Rep. 1191 (K. B., Trinity Term, 21 Chas. II, 1669), the earliest case, is reported incompletely and partly in French. Dame Carr, the defendant, had in a prior proceeding in Chancery filed an answer indicating that "she received no money, etc." The complainant filed exceptions to this answer. Whereupon, Dame Carr, in order to "explaine le generality del prim" [i. e., of the first answer] filed a second answer stating that "she received no money before such a day." Dame Carr was indicted for perjury. The court directed that she should be acquitted; and ruled that nothing shall be assigned as perjury, which is explained by the second answer, because the second answer makes that which was at first a perjury, no perjury.

As to this case, the first point to be noted is that the original answer was ambiguous, and the second answer was designed to "explaine le generality", not to withdraw the prior pleading. Moreover, it does not appear that the prosecution proved that the defendant had the requisite specific intent to tell a lie. There was no affirmative showing that the falsity of the first statement was deliberate. And (as we have already said, footnote 15, page 35, *supra*) the second and correcting statement will by itself serve as evidence that the first false statement was not willfully made. Hence the court

properly concluded that that which appeared "at first a perjury [became on considering the second statement] no perjury." 1 Siderfin, 418, 419.

This analysis of the *Carr* case must be sound if the case is to have any value at all. To interpret the case more broadly, as the respondent does (Br. Opp. 11), and to spell out of it a doctrine that recantation purges guilt, is, as Lord Eldon said, to make the case no longer acceptable in England,[26] and is, as Lord Coleridge said, to cast grave doubt on the accuracy of Siderfin's reporting.[27]

The next perjury case relied upon by the respondent (Br. Opp. 11) is *Rex* v. *Jones,* Peake 51,

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[26] Referring to the decision of *R.* v. *Carr*, Lord Chancellor Eldon suggested that it was doubtful "whether that would be held now" [i. e., 1813], *Edwards* v. *M'Leay*, 2 Vesey & Beames, 256, 258, 35 Eng. Rep. 316 (Chancery, 1813).

[27] In *Regina* v. *Holl*, 45 Law Times Reports, 69 (2 B. D. 1881), commented on at pages 49–52, *infra*, Chief Justice Coleridge said, with reference to the *Carr* case:

"It is true that a case in Siderfin's Reports, p. 418, was referred to as containing such a doctrine. There the party on an answer to a bill in Chancery had given a false statement that he had received no money, and the answer being set aside as insufficient had afterwards filed an amended answer stating that he had received no money before a certain day, and it was held that this so explained the former answer that it did not make the party liable for perjury. But if this be the effect of the case, then it is open to the observation made by Lord Coke that Siderfin, though he became a considerable lawyer, wrote his reports while young, and they were published after his death without his corrections, and, probably, if that case were looked into, it would be found consistent with the view of the law as expounded by my brother Bow

53; 170 Eng. Rep. 75 (Nisi Prius, King's Bench, After Hilary Term, 31 Geo. III, 1791). A witness who had taken down the defendant's evidence proved the words on which the perjury was assigned, but could not speak to any other part of his evidence. Lord Kenyon directed an acquittal on the ground (p. 53) that "the whole [28] of the Defendant's evidence on the former trial should be proved, for if in one part of his evidence he corrected any *mistake* he made in another part of it, it will not be perjury." [Italics added.]

It is plain that in the *Jones* case the false statement was due to "mistake," not to a deliberate lie. If the mistake was corrected in the later testimony, it was evidence that there was no *mens rea* when the false statement was uttered.[29] The principle of the *Jones* case has no application to a deliberate lie, or the attempt of the witness to retract (not merely to correct) that lie.

The cases so far discussed relate, as we have already emphasized, solely to erroneous or ambigu-

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[28] Under the later rule, the prosecution need not prove *all* the evidence on the trial, but merely so much of the defendant's evidence as relates to the issue upon which perjury is assigned. *Rex* v. *Dowlin*, Peake 227, 170 Eng. Rep. 138 (K. B. 1792); *Rex.* v. *Rowley*, 1 Mood. 111, 168 Eng. Rep. 1205 (Crown Cases Reserved, 1825); *Commonwealth* v. *Shooshanian*, 210 Mass. 123, 96 N. E. 70.

[29] *Rex* v. *Coote*, 10 British Columbia Reports, 285, 290, like the *Jones* case, holds that a defendant charged with perjury on the basis of an erroneous statement is entitled to show that at the trial where he made the error he subsequently "explained" or "qualified" the statement.

ous statements. In England such statements are not punished as perjury if, during the course of the trial, they are corrected or explained. But punishment is meted out where the first misstatement is a deliberate lie. Reference has already been made, page 44, *supra,* to one early example, *Rex* v. *Thorogood,* 8 Mod. 179, 88 Eng. Rep. 131 (Common Pleas, 1723), where a defendant was summarily summoned to appear in court and upon his admission that his affidavit in the cause was false was punished not for contempt but for perjury. Another even earlier case tending in the same direction is *Allen* v. *Westley,* Hetley 97, 124 Eng. Rep. 372 (1629), where it was recalled that one Styles had been held to be guilty of perjury when he swore that a fact was true which, indeed, was subsequently shown to be true, but which, at the time he uttered the statement, the witness believed to be false. See acc. *Vernon* v. *North* (unreported), referred to in Holdsworth, *History of English Law,* Vol. IV, p. 517, note 3. But we need not rely on cases that go back three hundred years, for we have on this point two English cases in the nineteenth century which are to the same effect.

The first of these nineteenth century cases is *Reg.* v. *Philpotts,* 5 Cox's Criminal Law Cases, 363 (1851) (Ct. Cr. App.). There the defendant had been a witness in an ejectment case. On the stand he had testified that a document which he presented was a copy of the will of one William Joseph and

that he had compared the copy with the original. In fact he had not made the comparison, and the party on whose behalf he testified immediately withdrew the document and it was not in evidence at the end of the case. The defendant was indicted for and convicted of perjury, and in his defense it was argued that there was no perjury because the document was withdrawn. On argument Lord Campbell, C. J., said (p. 366):

> The withdrawal of it can make no difference, because we must look at the state of things when the false swearing took place.

And in the opinion affirming the conviction, Lord Campbell, speaking for the Court of Criminal Appeal, added (p. 366):

> It was withdrawn; but the question whether perjury had been committed, must depend on the state of things when the witness left the box.

Another relatively recent English authority involves a state of facts singularly similar to those presented to this Court in the instant case. *Regina* v. *Holl*, 45 Law Times Reports 69 (Q. B. D., 1881). Affirmed on other grounds, 72 B. Div. 575 (C. A.). The Queen had appointed three commissioners to inquire into the corrupt practices alleged to have been committed during the parliamentary elections in the Borough of Sandwich. A general statute of Parliament, in substance, provided that one who answered truthfully questions put to him by such commissioners should receive from them a certificate which would have the effect

of making him immune from prosecution for any crimes as to which he testified.

The commissioners called one Edwards, an agent of the Liberal Party, and asked him as to a bill which he had sent in to Sir Julian Goldsmid, one of the candidates, which purported to contain the charge made by one Brown for his services at the election. Edwards said that the bill was for £14, that the charge was fair, and that the person shown on the face of the bill to have received the money did so. There the examination of Edwards ended.

But news of this testimony became bruited about; and six days later Brown, the man who was supposed to have received the £14, came before the commissioners, and told them that he had only received £4. Three days after that, Brown produced a letter from Edwards revealing that the latter had himself pocketed the £10 balance.

Following this development, Edwards was recalled to the stand and admitted that he had kept for himself £10. Upon this state of facts, the commissioners refused to grant Edwards a certificate of indemnity. He thereupon applied to the Commissioners for a mandamus to compel them to issue the certificate.

The Queen's Bench Division (Coleridge, C. J., Manisty and Bowen, JJ.) denied the application on two grounds, of which only the first is relevant to the case at bar. They held, first, that the commissioners were right in refusing the certificate inasmuch as Edwards had committed perjury; and,

second, that the courts would not in any event review by mandamus the commissioners' decision.

As to the first point, it had been argued at the bar that a witness who deliberately told a material falsehood was not guilty of perjury if he later made a clean breast of the whole transaction. This contention provoked from the bench the following observations during the argument (p. 70):

> COLERIDGE, C. J. The argument on behalf of Mr. Edwards seems to me to be this. A witness may tell the Commissioners a deliberate tissue of falsehoods, trusting that the witnesses who could disprove them are being kept out of the way, but when finding that they are forthcoming, may come forward and say, "All that I told you before was false; but now the truth is out I may as well acknowledge it", and yet is entitled to his certificate. BOWEN, J. I think there is just this amount of colour in the argument of the other side, that an indictment for perjury could not be sustained on an answer afterwards corrected or explained.

And at the end of the oral argument Lord Coleridge, delivering the only extended opinion of the three judges, ruled [30] as follows:

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[30] The soundness of this reasoning was not impugned when this case was subsequently taken on appeal to the Court of Appeal, and there affirmed on the ground that the Commissioners were not subject to review by mandamus. *The Queen* v. *Holl* (1881) 7 Q. B. Div. 575 (C. A.). Under this appellate determination it was unnecessary to consider the perjury point.

> It has been said that Mr. Edwards did not really deceive them, but did truly answer the Commissioners, because on the whole, from his subsequent examination and letters, the real truth was at last brought to the Commissioners' minds. But if it were true that at the last the truth under pressure of old Mr. Brown's story was coming from Mr. Edwards, it won't avail him. I agree with the law as expounded by my brother Bowen, that if in the course of an examination it turns out from a subsequent answer that an answer of a witness apparently false is found not to have been false, although capable of being construed solely and by itself into a perjurious statement, a prosecution for perjury cannot be sustained. But if a false statement is made by a person, and subsequently a contradiction is made by him which contains the truth, that would not entirely purge the falsehood of the original answer, and so not make it the cause and groundwork of a prosecution for perjury.

Summarizing these authorities, we contend that it is clear that in England a witness who makes a willful, unequivocal misstatement is, regardless of any future retraction, guilty of perjury; although one who makes a careless, erroneous, or ambiguous misstatement may, in order to prove that he is not guilty of perjury, show the jury statements subsequently made by him in the same proceedings which correct, qualify, or explain the first statement.

On the precise point of the effect of a recantation of a deliberate falsehood, there is no authority, by decision or dictum, in the highest court of any of the States of chief importance in criminal law or general jurisprudence. But there are scattered comments in other courts, mostly of inferior jurisdiction.

Two decisions may be said to support our position. *People* v. *Freeman,* 256 Ill. App. 233 (Chicago 1st Dist.) which grew out of a contempt, not a perjury, proceeding, held that a witness who, in the direct examination, gave willfully false testimony, but corrected the testimony on cross-examination, was punishable for a contempt of court. *Martin* v. *Miller,* 4 Mo. 47, also involved, though indirectly, a similar point. This was a slander action in which the plaintiff alleged that the defendant had defamed him by calling him a perjurer. The defendant pleaded truth, and proved that in a prior judicial proceeding the plaintiff had sworn falsely as to the money he had received, but had later recanted. The defendant asked the trial court in the slander case to instruct the jury that if they believed the defendant's proof, the plaintiff had been guilty of perjury. The trial court refused the instruction; judgment went for the plaintiff; and the defendant appealed. On appeal the Supreme Court of Missouri held that the refusal to give the

instruction was reversible error. The court said, pp. 48–49:

> If perjury was committed by plaintiff in denying any matter, it is not perjury the less because on cross-examination or further examination of him, he confessed or stated the matter which he had before denied.

There are other decisions which, at first blush, seem to be against us, but most of which, on careful examination, was in accord with our position. Almost all of these apparently opposed decisions stem from dicta in *People* v. *Gillette,* 126 App. Div. 665, 673 (N. Y. 1st Dept.). The defendant, an officer of a life insurance company, had testified before the grand jury that a certain bank account "is my personal account" and that the money there deposited "Came from my personal account." (Page 667.) "Immediately thereafter and without leaving the witness stand he stated that he received from time to time from certain officers of the insurance company, various amounts of cash to be used for confidential purposes in the interest of the company" (*Ibid*), and the bank account in question was the place in which this cash, after being temporarily placed in the defendant's private safe, was ultimately deposited, and from which disbursements were made for these confidential purposes. The defendant, having been indicted for, and in the trial court convicted of, perjury on the basis of the statements first quoted,

appealed. In the Appellate Division all the judges agreed that the judgment should be reversed. McLaughlin, J., wrote the only extended opinion. He first pointed out that the defendant's original answers were strictly true. But then he added (p. 673–674):

> Even if it be said that the answers were misleading, in that he did not at once explain fully as to the matter, it did no harm, because immediately following such answers, and before he left the witness stand, he told the whole truth with reference to the account and the source from which the fund came. No one was misled; no one was deceived, and no one was injured. There is absolutely no evidence to justify a finding by the jury that he "wilfully, knowingly and corruptly" testified falsely.
>
> But I do not choose to rest my conclusion on this ground alone. Even if it be assumed that the answers were false and made with the intention of misleading or deceiving, an indictment for perjury could not be predicated thereon, inasmuch as immediately thereafter he fully explained the nature of the account and the source from which the fund came. A judicial investigation or trial has for its sole object the ascertainment of the truth that justice may be done. It holds out every inducement to a witness to tell the truth by inflicting severe penalties upon those who do not. This inducement would be destroyed if a witness

> could not correct a false statement except by running the risk of being indicted and convicted for perjury.
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> * * * * *
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> I am of the opinion that the defendant was not legally indicted; that the indictment is fatally defective, and that he was not justly convicted, and that the judgment of conviction should, therefore, be reversed, the indictment quashed and the defendant discharged.

This opinion (with which Ingraham, J., concurred, and in which the three other judges concurred specially), although much more lenient than the English rule, would still not be broad enough to save the respondent in the case at bar. For the situation covered by the dictum is quite different from the one at bar. There at worst the original misstatements were equivocal and "misleading" (p. 673); here they were clear unambiguous lies. There there was "no evidence to justify a finding by the jury that he [the defendant] 'wilfully, knowingly, and corruptly' testified falsely" (p. 673); here the evidence shows that the respondent "knew at the time of testifying [that] * * * what he was saying was not true" (R. 37). There the defendant "immediately * * * before he left the witness stand * * * told the whole truth" (p. 673); here the respondent waited

until after seven intervening witnesses had spoken, and then he still had to be prodded to confess so much of his perjury as had already been detected. (R. 38, 9 lines from the bottom of the page.)

The dictum in the *Gillette* case was reiterated, again as a dictum, in *People* v. *Brill,* 100 N. Y. Misc. 92, 102 (Gen. Sess.) The defendant, in the course of a prior trial, had been asked whether he had signed a particular paper. At first he denied it. "This defendant's attention was not at first directed to the particular paper and when a photographic copy of it was subsequently shown him he told the truth and admitted that he had signed it" (p. 102). In determining that there was no perjury, the court rested its decision on the ground that the paper was not material. But the Court gratuitously added that the retraction would have wiped out the perjury. Even if this view were sound it would not apply to a case like that at bar where the question and answer are unambiguous; the intent to lie is admitted; and the retraction occurs only after intervening witnesses have exposed the falsehood.

Indeed, in New York itself the dictum in the *Gillette* case (which, it may be noted, has never had the express or implied approval of the Court of Appeals of that State) was not applied to relieve the guilt of a witness who made a retraction of his first falsehood only after he had left the witness

stand. *People* v. *Markan,* 123 Misc. Rep. 689, 206 N. Y. Supp. 197.[31]

The Gillette theory has unfortunately had some currency outside of the jurisdiction in which it was uttered. Thus a similar view was adopted in Indiana in a case involving the correction of an *erroneous* and probably careless statement, *Henry* v. *Hamilton,* 7 Blackford, 506,[32] and in Florida in

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[31] In this case the defendant had been indicted for subornation of perjury by two persons named Kaplan and Goldstein, and he defended on the ground, *inter alia*, that they had not committed perjury. The facts were that Kaplan and Goldstein, being summoned to testify in a trial court, had deliberately made materially false statements. Several months after their examination and cross-examination had been completed, but before the trial court decided the case, the same witnesses came in and corrected their testimony. It was argued that under the doctrine of the *Gillette* case this avoided the crime of perjury. But the argument was rejected, Collins J. holding (p. 199–200) that—

"The cases referred to did not go to the extent of holding that after an interval of several months the correction of testimony indicating the utter falsity of that previously given would destroy perjury, nor did they hold even by inference, as contended by the defendants in this case, that correction at any time before the termination of a trial by decision would cure perjury committed."

[32] This was a tort action for slander. The plaintiff alleged that the defendant had slandered him by calling him a perjurer; and in answer the defendant justified by pleading the truth of the statement. On the evidence it appeared that in a prior unrelated suit this plaintiff, testifying as a witness, had first said that this defendant had thrown one Roysdon off a bench, and knocked a candle from the hand of one Remington; but later in that prior suit, the then witness (now plaintiff) corrected his error. On the basis of

a case in which the defendant qualified a prior statement in which he had fixed with too great assurance a particular date as to which he later admitted he had some uncertainty. *Brannen* v. *State,* 94 Fla. 656, 114 So. 429.[33] In only one case, however, and that in a court of limited authority, has the dictum been cited to purge the guilt of a witness who had deliberately lied and then recanted. *Commonwealth* v. *Irvine,* 14 Penn. Dist. & County Rep. 275.[34] And even there the retraction took

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this evidence the lower court ruled (and the appellate court affirmed) that the plea of truth in the slander suit failed since "a witness, who had made an *erroneous* statement in giving evidence, but who subsequently corrected it, is not guilty of perjury in making such statement" (p. 509). [*Italics added.*]

[33] In a trial in which the chastity of a woman was in issue, the defendant first testified that he had seen one Thomas embrace the woman on Easter Sunday. Later, and before he had been contradicted (p. 660), he testified that he was not positive whether it was Easter Sunday, the Sunday before or the Sunday after. On the basis of the first statement, the defendant was indicted and convicted of perjury. On appeal the conviction was reversed on the ground that where, before the final submission of a case, a witness corrects or modifies a false statement, he cannot be convicted of perjury on the basis of his original misstatement. (pp. 662–663.)

[34] *Com.* v. *Irvine,* 14 Penn. Dist. & County Rep. 275. In a prior proceeding the defendant had first testified that certain jewelry had been stolen from him; but as he was pressed by further questioning he admitted that he had pawned the jewelry. He was indicted for perjury in the first statement, and on the trial demurred to the evidence. The demurrer was sustained on the ground that the false testimony having been corrected was not punishable as perjury.

place while the witness was still on the stand and before others had exposed him.

From this review it appears that none of the state cases cited by the respondent goes so far as to allow a witness to go scot free if he deliberately lies, waits until he is contradicted, and then takes the stand to recant.

3. CASES IN THE FEDERAL COURTS

There are two Federal cases which squarely support our position. In *Masaichi Ono* v. *Carr*, 56 F. (2d) 772 (C. C. A. 9th), it was held that an alien who admitted that he had given deliberate false testimony on his direct examination on November 12, and retracted it in his cross-examination on the following November 21, was guilty of perjury and could, on that ground, be denied admission to the United States. In *Ex parte Chin Chan On*, 32 F. (2d) 828 (W. D. Wash.), it was held that an alien who had admitted that he had made a deliberately false statement on January 23, before the immigration authorities, and recanted on the following March 11, before the same authorities, was guilty of perjury and could properly be denied entry to this country. Compare *Johnson* v. *United States*, 41 F. (2d) 44, 46 (C. C. A. 9th); see *Seymour* v. *United States*, 77 F. (2d) 577, 582 (C. C. A. 8th), quoted pages 33–34, *supra*.

Moreover, it seems that a bankrupt who first denies that he has any assets and then admits the contrary can be prosecuted for perjury. *In re*

Gordon, 167 Fed. 239, 240 (S. D. N. Y.); *In re Wiesebrock,* 188 Fed. 757, 758 (E. D. N. Y.).

Where the *Gillette* dictum has been cited to a Federal court, it has not been followed, much less extended to cover a case where the witness does not recant before he leaves the witness stand. Thus, when the *Gillette* case was drawn to his attention in *Ex parte Keizo Shibata,* 35 F. (2d) 636 (C. C. A. 9th), Circuit Judge Dietrich, with unconcealed skepticism, said that "if that be the law" (p. 638) it means no more than that "where a witness who has given false testimony retracts it *before he leaves the witness stand,* it cannot be made the basis of a perjury charge." [Italics added.] (p. 637.) Compare *Masaichi Ono* v. *Carr, supra:* And when Circuit Judge Learned Hand was referred to the *Gillette* case, he said that the Second Circuit Court of Appeals did "not rely upon that case or mean to accept the doctrine," though "*Perhaps* all a man's testimony upon a *continued* inquiry must be taken together, and no prosecution will lie if he recants before he is through." [Italics added.] *Loubriel* v. *United States,* 9 F. (2d) 807, 808 (C. C. A. 2d).

The only federal case which the respondent cites, *Bijur* v. *Bendix,* 285 Fed. 974 (App. D. C.), is not opposed to our position. The *Bijur* case was a patent controversy in which one claimant urged that his adversary and some of the latter's witnesses perjured themselves before a Patent Office tribunal, and one of the witnesses was particularly assailed because he "made an incorrect answer to a question on cross-examination" though he

"rectified it almost immediately" (p. 975). The court ruled that this was not perjury. Of course that ruling has no bearing on the case at bar since there, unlike here, the answer was merely incorrect, not false, and due to inadvertence, not design. Moreover, the correction followed fast upon the heels of error.

In short, we contend that upon authority no less than upon principle a witness who, with intent to deceive, has given an unequivocally false statement, is guilty of perjury, and he cannot purge his guilt by returning to the stand and retracting his falsehood.

CONCLUSION

We therefore respectfully submit that the judgment of the court below should be reversed.

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No. 600

IN THE

Supreme Court of the United States

October Term, 1936

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

GEORGE W. NORRIS,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUBJECT INDEX

	Pages
STATEMENT	1
SUMMARY	4
ARGUMENT	5
I. Crime of Perjury Under Criminal Code Is Merely Statutory Adoption of Common-Law Offense	5
II. When Congress Adopts a Common-Law Offense, Common-Law Interpretation Obtains	7
III. The Whole of the Evidence of Witness to Be Taken Together and if Ultimately True, It Is Not Perjury	10
IV. If Writ of Certiorari Be Granted, Supreme Court May Proceed to Complete Decision of Case	16
V. Congress Has No Power to Regulate Primary Elections	17
VI. Materiality	20
VII. To Constitute Perjury Oath Must Be Taken in a Case Under a Law of the United States	22

TABLE OF CASES

Brannan v. State, 94 Fla. 565, 114 So. 429	11
Cole v. Ralph, 252 U. S. 286, 40 Sup. Ct. 321	16
Commonwealth v. Hillenbrand, 96 Ky. 407, 29 S. W. 287	23
Commonwealth v. Irvine, 14 Pa. Dist. and County Reports 275	11
Hamilton Brown Shoe Co. v. Wolf Bros. & Co., 240 U. S. 251, 36 Sup. Ct. 269	15

INDEX—Continued

	Pages
Hammer v. United States, 271 U. S. 620, 46 Sup. Ct. 603	9
Henry v. Hamilton & Blackf. (Ind.), 506 (Nov. term, 1845, Sup. Ct. of Ind.)	11
In the Matter of Popper, 193 App. Div. N. Y. 505	13
In re Green, 52 Fed. 104	8
Kilbourn v. Thompson, 103 U. S. 168, 26 L. Ed. 377	18, 19
King v. Carr, 1 Siderfin's Reports 418	11
King v. Jones, 1 Peake's Report 37	10, 11
Langnes v. Green, 282 U. S. 531, 51 Sup. Ct. 243	16
Magnum Import Co. v. Coty, 262 U. S. 159, 43 Sup. Ct. 531	15
Martin v. Miller, 4 Mo. 39	13, 14
McGrain v. Daughterty, 273 U. S. 135, 47 Sup. Ct. 319	18
Morris v. United States (C. C. A. 7), 261 Fed. 175	20, 22
Newberry v. United States, 256 U. S. 231, 41 Sup. Ct. 469, 65 L. Ed. 913	18
Patterson v. United States (C. C. A. 9), 181 Fed. 970	23
People v. Brill, 165 N. Y. S. 65	11
People v. Gillette, 126 App. Div. N. Y. 665, 111 N. Y. S. 133	10, 11, 13
Phair v. United States (C. C. A. 3), 60 Fed. (2d) 953	21
Seymour v. United States, 77 Fed. (2d) 577	12, 14, 15
Sinclair v. United States, 279 U. S. 263, 49 Sup. Ct. 268	18
State v. Eaid, 55 Wash. 302, 104 Pac. 275, 33 L. R. A. N. S. 946	6
State v. Larson, 171 Minn. 246, 213 N. W. 900	23
State of Ohio ex rel. Seney v. Swift & Co., 260 U. S. 146, 43 Sup Ct. 22	15

INDEX—Continued

	Pages
Story Parch. Co. v. Patterson Parch. Paper Co., 282 U. S. 555, 51 Sup. Ct. 248	16
United States v. Bailey, 9 Peters 238, 34 U. S. 113	7
United States v. Bedgood, 49 Fed. 54	23
United States v. Cardish, 143 Fed. 640	7
United States v. Dupont, 176 Fed. 823	23
United States v. George, 228 U. S. 14, 33 Sup. Ct. 412	23
United States v. Maid, 116 Fed. 650	23
United States v. Mamon, 44 Fed. 800	23
United States v. Palmer, 3 Wheat 630, 4 L. Ed. 471	8
United States v. Rhodes, 218 Fed. 518	22
United States v. Robertson, 257 Fed. 195	23
United States v. Slutzki (C. C. A. 3), 79 Fed. (2d) 504	21
United States v. Trans-Missouri Freight Association, 166 U. S. 290, 17 Sup. Ct. 540	8

TEXT BOOKS

48 Corpus Juris 282	11
Bishop's New Criminal Law (9th Ed.), Sec. 1044a	11
4 Cooley's Bl. Com. 437	6
3 Coke Inst. 164	6
Hawkins P. C. lib. c. 69 s. 1	6

STATUTES

Section 125, Criminal Code (Title 18, Sec. 231, U. S. C. A.)	4, 5, 6, 22, 23
Title 28, Sec. 347, U. S. C. A.	16
Sec. 32-1140 et seq., Comp. St. of Nebr. 1929	17

SENATE RESOLUTION

Senate Resolution No. 215, April 10, 1930	17, 18

CONSTITUTION

Art. 1, Sec. 1, United States Constitution	23
Art. 1, Sec. 8, Clause 18, United States Constitution	23

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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT

The statement by petitioner that "in consideration for filing in opposition to Senator Norris the respondent was paid $50.00 to cover his filing fee and was given $500.00 for campaign expenses," is a conclusion not justified by the evidence.

The true facts are that respondent, on June 25, 1930, forwarded to a friend in Lincoln, Nebr., his application as a candidate for Railway Commissioner of the State of

Nebraska, which act was of his own volition and choice (R. 43).

Five days later Hugh Drake, one of the Railway Commissioners of the State of Nebraska, and who was a candidate for re-election, his brother Oscar Drake, Victor Seymour, and A. Paul Johnson, an attorney of Broken Bow, Nebr., conferring together in a hotel room at Kearney, Nebr., arranged that Johnson should confer with respondent and request him "not to file as a candidate for Railway Commissioner but to file for the United States Senate," offer to pay his filing fee of $50 and his campaign expenses estimated at $500 (R. 34-38).

The next day Johnson told respondent about this conference, "that Mr. Seymour stated he was prominent in the Republican party nationally," that he requested respondent "not to file as a candidate for Railway Commissioner but to file for the United States Senate," that his filing fee of $50 and campaign expenses estimated at $500 would be paid and "the Republican party would support him" (R. 35).

A few days later respondent forwarded to the Secretary of State his application "requesting that his name be placed upon the official primary ballot of the Republican party for the primary election to be held August 12, 1930, as a candidate for Senator of the United States for Nebraska" (R. 29).

Respondent testified, and there was no evidence in denial, that his acts in the matter were "in good faith and felt that with the promise of support he had a chance to win the nomination." Upon sending his application to the Secretary of State he resigned his position in the store in which he was employed (R. 44).

The Secretary of State received his application 38 days and not 40 days, prior to the primary election, as required by the Nebraska Statute. On July 18, 1930, a judgment of the Supreme Court of Nebraska was entered finding that this application was not filed "within the time required by law" and it ordered the Secretary of State to "omit from the list of candidates for United States Senator" the name of respondent (R. 40).

The record discloses no campaign nor any act which could be construed as part of a campaign by respondent.

More than two months after the Supreme Court had entered its judgment, respondent was called as a witness before a Senate Sub-Committee and the indictment charges that he falsely testified that he did not "receive any money from anybody in the *campaign,*" nor any assurance of financial support or backing (R. 89).

A. Paul Johnson had testified before the same Sub-Committee that he had not paid respondent anything and had no knowledge that respondent had received any contribution (R. 37). He returned to the witness stand and corrected his testimony.

Then respondent voluntarily returned to the witness stand, stated he would make a few changes in his testimony "as Mr. Johnson has," and he related then what occurred as to the payment of his filing fee, the receipt of a bond for $500, and the assurance he had been given as to financial support and backing (R. 47, 48).

The trial court declined to direct a verdict for respondent and refused to instruct the jury that one who corrects his testimony while the matter is yet pending, is not guilty of perjury (R. 60, 61).

(Where italics are used, they are by the author of the brief.)

The Circuit Court of Appeals reversed the judgment of conviction on account of this failure to so instruct the jury (R. 69-73).

SUMMARY

I. The crime of perjury under the Criminal Code, Section 125 (Title 18, Section 231, U. S. C. A.), is a statutory adoption of the common-law offense of perjury, with no material change.

II. When Congress adopts a common-law offense, without an indication of an intention to give a new significance to the offense, the common-law definition must obtain.

III. The whole of the evidence of a witness is to be taken together and if the testimony be ultimately true, an indictment cannot be predicated thereon. The law encourages the correction of even intentionally false testimony and holds out every inducement to a witness to tell the truth without running the risk of being indicted and convicted for perjury.

IV. If a writ of certiorari be granted, the entire record is before this Court and it may proceed to a complete decision and enter the judgment which should have been rendered by the court below on the record then before it.

V. Congress has no power to legislate for the purpose of regulating primary elections.

VI. The inquiries complained of in the indictment herein were immaterial matters so far as the Senate

Committee in question was concerned. This Committee acted under a Senate Resolution authorizing only the investigation of "*campaign expenditures of the various candidates for the United States Senate.*" The respondent was not a candidate nor did the inquiry pertain to any incidents in connection with the candidacy or campaign of any of those who were candidates. The inquiries upon which the indictment is based referred solely to the campaign of respondent. The evidence contained no reference to any campaign by respondent, nor any incident which might be said to be a part of a campaign.

VII. To constitute perjury, it is essential that the oath be taken in a "case in which a law of the United States authorizes an oath to be administered."

The points raised in numbers V, VI, and VII of this summary were raised in the trial court and in the Circuit Court of Appeals, by demurrer (R. 11-13), by motions for directed verdict (R. 40, 48), by motion for new trial (R. 15), and by assignments of error. They present added reasons for sustaining the judgment of the Circuit Court of Appeals, and each of these three reasons also justify a dismissal of this prosecution.

ARGUMENT

I.

The Crime of Perjury Under United States Criminal Code Is Merely a Statutory Adoption of the Common-Law Offense

The crime of perjury as defined in Section 125 of the Criminal Code (Title 18, Sec. 231, U. S. C. A.), quoted

on page 2 of petitioner's brief, is merely a statutory adoption of the common-law offense of perjury, with no material change. This is recognized by petitioner at page 8 of its brief in describing the crime charged against the defendant as being "perjury, an old common-law offense."

Petitioner's argument is premised on the statement that Section 125 of the Criminal Code is silent on the matter of "subsequent correction" of testimony. In such silence, the Criminal Code follows precisely the common-law definition of perjury, as do other legislative definitions by the various states.

Blackstone defines perjury as:

> "A crime committed when a lawful oath is administered in some judicial proceeding, to a person who swears willfully, absolutely, and falsely in a matter material to the issue or point in question."
>
> 4 Cooley's Bl. Com. 137.

Definitions by Lord Coke and Hawkins are of like effect.

> 3 Coke Inst. 164.
>
> Hawkins P. C. lib. c. 69 s. 1.

With reference to a state statute defining perjury, which is comparable to Section 125 of the Criminal Code, the Supreme Court of Washington said:

> "Our statutory definition of perjury does not differ materially from the definitions found in Hawkins, Bacon, Blackstone, and other common-law writers."
>
> *State v. Eaid,* 55 Wash. 302, 104 Pac. 275, 33 L. R. A. N. S. 946.

And with reference to an act of Congress defining the crime of false swearing, also recognized at common law as an offense distinct from perjury, this Court, in an opinion by Justice Story, said:

> "The act does no more than change a common-law offense into a statutory offense."
>
> *United States v. Bailey*, 9 Peters 238, 34 U. S. 113.

Likewise, it is clear, the crime of perjury under the above Criminal Code is, so far as this case is concerned, identical to the common-law crime of perjury.

Therefore, the Circuit Court of Appeals was quite right in following the uniform holding of the decisions in the cases described by petitioner as "common-law cases decided by the English and state courts" as to the effect of a "subsequent correction" or testimony upon the existence of the crime of perjury at common law and under statutes following the common-law definition of perjury.

II.

When Congress Adopts a Common-Law Offense, the Common-Law Interpretation Thereof Obtains

When Congress adopts a common-law offense, without an indication of an intention to give a new significance to the offense, the common-law definition must obtain.

This principle was stated in *United States v. Cardish*, 143 Fed. 640, where the Court said:

> "The rule seems to be well settled that when Congress by statute refers to or adopts a common-

> law offense, without further definition, the common-law definition must obtain. Re Green (C. C.) 52 Fed. 104, 111."

In the case cited of *In re Green*, 52 Fed. 104, the second syllabus reads in part:

> "when congress adopts or creates a common-law offense, the courts may properly look to the common law for the true meaning and definition thereof, in the absence of a clear definition in the act creating it."

In *United States v. Palmer*, 3 Wheat. 630, 4 L. Ed. 471, this Court, in an opinion by Chief Justice Marshall said that the term robbery "must be understood in the sense in which it is recognized and defined at common-law."

In *United States v. Trans-Missouri Freight Association;* 166 U. S. 290, at page 353, 17 Sup. Ct. 540, at page 563, the dissenting opinion of Justice White reviews certain principles as to which there was no dispute in that case, as follows:

> "The well-settled rule is that where technical words are used in an act, and their meaning has previously been conclusively settled by long usage and judicial construction, the use of the words without an indication of an intention to give them a new significance is an adoption of the generally accepted meaning affixed to the words at the time the act was passed. Particularly is this rule imperative where the statute in which the words are used creates a crime, as does the statute under consideration, and gives no specific definition of the crime created."

This principle was applied by this Court to the interpretation of the specific perjury statute involved herein,

in *Hammer v. United States*, 271 U. S. 620, 46 Sup. Ct. 603, where this Court, per Justice Butler, said:

> "The general rule in prosecutions for perjury is that the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the accused set forth in the indictment as perjury. The application of that rule in federal and state courts is well nigh universal."

It is to be noted that the perjury statute does not refer in any way to the number of witnesses required to prove the falsity of testimony and the above holding of this Court constitutes the following of a rule of law well established with reference to the proof required to establish the crime of perjury. The absence of any mention in the Criminal Code of anything upon this point is held by this Court to constitute an acceptance by Congress of the rule stated in the opinion in the above case, thus:

> "The rule has long prevailed, and no enactment in derogation of it has come to our attention. The absence of such legislation indicates that it is sound and has been found satisfactory in practice."

The same conclusion and effect must be deduced from the absence in the perjury statute of specific mention of "subsequent correction" of testimony and in line with the above principle it must follow that the uniform and long established rule with reference to the "subsequent correction" of testimony must logically be the rule of decision upon this point.

III.

The Whole of the Evidence of a Witness Is to Be Taken Together and if the Testimony Be Ultimately True, an Indictment Cannot Be Predicated Thereon

In 1790 Lord Kenyon said in *King v. Jones,* 1 Peakes Report 37:

> "The whole of the defendant's evidence on the former trial should be proved, for if in one part of his evidence he corrected any mistake he had made in another part of it, it will not be perjury."

And Judge Faris in deciding this case below said:

> "If what he last swore comprehends a full correction, his last testimony comprises the ultimate facts in the case, so far as the witness is concerned." (R. 71.)

In fact a corrected mis-statement forms no part of the evidence after the correction is made. It is no longer the assertion of a fact.

Even if the testimony of the witness was intentionally false, yet if he correct it while the matter is still pending, he is not guilty of perjury. The law encourages the correction of even intentionally false testimony. As was said in *People v. Gillette,* 126 App. Div. N. Y. 665, 111 N. Y. S. 133, "A judicial investigation or trial has for its sole object the ascertainment of the truth, that justice may be done. It holds out every inducement to a witness to tell the truth by inflicting severe penalties upon those who do not. This inducement would be destroyed if a witness could not correct a false statement except by

running the risk of being indicted and convicted for perjury."

People v. Brill, 165 N. Y. S. 65.
People v. Gillette, 126 App. Div. 665, 111 N. Y. S. 133.
Brannan v. State, 94 Fla. 565, 114 So. 429.
Henry v. Hamilton, & Blackf. (Ind.), 506 (Nov. term 1845, Supreme Court of Indiana).
Commonwealth v. Irvine, 14 Pa. Dist. and County Reports 275.
King v. Carr, 1 Siderfin's Reports 418.
King v. Jones, 1 Peakes Report 37.
Bishop's New Criminal Law (9th Ed.), Sec. 1044a.

"Even a bona fide but incompleted attempt to correct false testimony may show absence of the criminal intent essential to perjury."

48 Corpus Juris 282.

The administration of justice will best be served by encouraging a witness to correct his testimony while the matter is yet pending in order that the truth be ultimately established in the very proceeding. But if a witness dare not correct either inadvertent or intentional mis-statements, without running the risk of prosecution and punishment, the administration of justice will be greatly hindered.

The Solicitor General, in his brief says that "the decision (below) presents an alarming obstacle to effective judicial, legislative, and administrative investigation." In this, we think he clearly errs. The alarming obstacle would be created if no witness could correct his testimony while the matter was yet pending.

Furthermore, the rule contended for by the Solicitor General would extend criminal responsibility beyond the

terms of the present perjury statute and would deprive the defendant of the established rules of law which have been in existence for nearly 300 years.

If Congress intended that perjury should exist notwithstanding the correction of erroneous testimony, it must be presumed, in view of the unanimity of decisions upon the point, that it would at sometime have so specifically provided in the perjury statute.

After all this lapse of years, if the Solicitor General feels that the long established rule should be changed, he should address his plea to Congress.

The Solicitor General is in error on pages 7 and 8 of his brief where he states that in *Seymour v. United States*, 77 Fed. (2d) 577, it was held that "Seymour's subsequently telegraphed offer to correct his testimony did not condone his perjury." The telegram in question is contained on pages 581-2 of the opinion. As to this the court below said:

> "In fact, his telegram, to the Committee does not by its language amount to a request that he be allowed to correct anything he had theretofore sworn to, nor is there any admission or intimation in it that he had sworn falsely. So, it did not even constitute 'a *bona fide* but incompleted attempt to correct false testimony.' At best, it simply indicated his willingness, at his own convenience, to give further testimony; whether true or false, does not appear." (R. 71.)

There are other errors in the brief of petitioner. On page 6 it is stated that "the court below relied upon several common-law cases cited by the English and state courts." It so happens, however, that these cases dealt

both with the crime of perjury as defined under the common law and also with state statutes defining perjury, which like the Federal Perjury Statute, followed the common law.

The author of the brief is also in error in saying that in each of these cases perjury was corrected not "after an interval," etc. In some of these cases an interval of several weeks had transpired. The true test laid down in these cases is that the correction must be made while the matter is yet pending. In other cases witnesses have corrected their testimony after the matter has been determined. In these cases it is held that the correction avails the witness nothing.

Counsel for petitioner cites two cases to uphold his position, but neither apply. In fact, the first case cited, *In the Matter of Popper,* 193 App. Div. N. Y. 505, sustains the position of respondent rather than of petitioner. This was a disbarment proceeding against one Popper and the proof showed that the next day after he had testified falsely, he returned to the witness stand and corrected his testimony. His counsel cited the case of *People v. Gillette,* 126 App. Div. 665, 111 N. Y. S. 133, and claimed that respondent, by correcting his testimony, "did not commit perjury." The court said:

> "It is of little moment whether respondent was guilty of technical perjury or not.
>
> "This proceeding is not a criminal prosecution."

There is no statement in this decision that detracts one iota from the rule laid down in the Gillette case.

The other case cited in brief of petitioner, *Martin v. Miller,* 4 Mo. 39 (decided in 1835), was a civil action for

slander with no question of perjury involved. Neither was there, in the opinion, any reference to or discussion of the authorities even then existing, upon the matter of the correction of testimony.

The decision of the court below does not, as the Solicitor General says on page 5 of his brief, fly "in the teeth of Section 125 of the Criminal Code," but rather the conclusion of the Solicitor General, that one who does correct his testimony is still guilty of perjury, flies in the teeth of the long established law on this subject.

Counsel in the brief also say that "the decision below, unless corrected, would tend to reduce the perjury statute to a status * * * of practical impotence" (page 8). But it appears, however, that in not far from 300 years there are to be found in the reports not more than seven cases where the defense has been that there was no perjury because the witness corrected his testimony while the matter was yet pending. If this construction had reduced the perjury statute to a status of impotence, or had not been found "sound" and "satisfactory in practice," some legislative body, long before this time, would have corrected it by amendment of the statute.

And we think the Government recognized the existence of this rule in this case, for though the indictment was returned on June 23, 1931, the Government did not see fit to cause this case to be brought on for trial until in December, 1935. The Government was no doubt encouraged to try the case at that time by reason of the statement quoted at the top of page 8 of petitioner's brief from the decision of the Circuit Court of Appeals, in *Seymour v. United States*, 77 Fed. (2d) 577, which was decided April 22, 1935.

The court below, however, did not hesitate to say that the statement quoted from the Seymour case was "*obiter dictum* merely" and "in fairly direct contradiction to what we deem to be the true rule of law" (R. 70-71).

It thus appears that all reported decisions are to this one effect and there has never been any indication in any decisions of this Court or any of the reported decisions in any court in England or America, of any dissent from the uniform rule above stated, which had its origin as early as 1660.

Thus a rule of uniformity has been established which neither Congress nor the legislature of any state has ever sought to change. And the petitioner herein has not shown any question of such peculiar gravity or general importance as to justify the granting of a writ of certiorari herein, which is only granted under special circumstances "to secure uniformity of decision and to bring up cases of importance, which it is in the public interest to have decided by the court of last resort." Such jurisdiction is exercised sparingly.

Hamilton Brown Shoe Co. v. Wolf Bros. & Co., 240 U. S. 251, 36 Sup. Ct. 269.

State of Ohio ex rel. Seney v. Swift & Co., 260 U. S. 146, 43 Sup. Ct. 22.

Magnon Import Co. v. Coty, 262 U. S. 159, 43 Sup. Ct. 531.

Respondent therefore urges that the writ should be denied. If, however, this Court grants this writ, respondent has other and additional grounds, which were presented in both the trial court and the Circuit Court of Appeals, which would also justify the judgment of reversal entered by the Circuit Court of Appeals.

IV.

If Writ of Certiorari Be Granted, This Court May Proceed to a Complete Decision of the Case

On certiorari to review judgments of the Circuit Court of Appeals, "the entire record is before this Court" and it may "proceed to a complete decision" and "enter the judgment which should have been rendered by the court below on the record then before it." Respondents may urge additional grounds to sustain the judgment of the lower court, and need not file a cross-petition for certiorari.

Langness v. Green, 282 U. S. 531, 51 Sup. Ct. 243.

Story Parch. Co. v. Patterson Parch. Paper Co., 282 U. S. 555, 51 Sup. Ct. 248.

Cole v. Ralph, 252 U. S. 286, 40 Sup. Ct. 321.

Title 28, Section 347, U. S. C. A., reads in part:

> "(a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

Therefore, if the writ be granted herein, we urge the following grounds as additional reasons for upholding the judgment of reversal entered by the Circuit Court of Appeals and which respondent insists also require a dismissal of this prosecution.

V.

Congress Has No Power to Legislate for the Purpose of Regulating Primary Elections

The record herein shows that the matters concerning which the respondent testified and for which he was indicted, dealt solely with a primary election to be held within the State of Nebraska on August 12, 1930. At this election the political parties, Republican or Democratic, would choose their respective candidates for various offices, including United States Senator. It was clearly and exclusively a state election conducted under the provisions of sections 32-1140, et seq., Comp. St. of Nebr. 1929.

There are separate ballots for each political party. The voter declares his politics and is given a ballot of the party to which he belongs. It is in reality a party election under state supervision whereby the political parties nominate their candidates for the respective offices.

The Senate resolution under which the Sub-Committee purported to act was Senate Resolution No. 215, dated April 10, 1930, and as far as material, reads:

> "Resolved, That a special committee, consisting of five Senators, to be appointed by the Vice-President, is hereby authorized and directed to investigate the *campaign expenditures* of the various *candidates* for the *Unites States Senate*, the names of the persons, firms, or corporations subscribing, the amount contributed, the method of expenditure of said sums and all facts in relation thereto, not only as to the subscriptions of money and expenditures thereof but as to the use of any other means or influence, including the promise or use of patronage, and all other facts in relation thereto which would not only be of

public interest but which would aid the Senate in enacting any remedial legislation or in deciding any contest which might be instituted involving the right to a seat in the United States Senate.

"The investigation hereby provided for, in all the respects above enumerated, shall apply to *candidates* and contests before Senatorial primaries, senatorial conventions, and the contests and campaign terminating in the general election in November, 1930."

That the Committee had no authority to conduct inquiry to ascertain facts which would be, as stated in the resolution "of public interest," is well settled by the decisions of this Court wherein it has been held that:

"Neither branch of the legislative department, • • • possesses, or can be invested with, a general power of making inquiry into the private affairs of the citizen."

Sinclair v. United States, 279 U. S. 263, 49 Sup. Ct. 268.
Kilbourn v. Thompson, 103 U. S. 168, 26 L. Ed. 377.
McGrain v. Daughterty, 273 U. S. 135, 47 Sup. Ct. 319.

The next subject covered by the Senate Resolution was the matter of aiding "the Senate in enacting any remedial legislation." But every incident referred to in the evidence pertained to the primary election to be held in Nebraska in 1930. It is now settled, however, that Congress has no power to legislate for the purpose of regulating primary elections.

Newberry v. United States, 256 U. S. 231, 41 Sup Ct. 469, 65 L. Ed. 913.

The third and last matter mentioned in the Resolution was to aid the Senate "in deciding any contest which

might be instituted involving the right to a seat in the United States Senate." The record discloses that the application of respondent was not filed with the Secretary of State within the time required by law and the Supreme Court ordered that his name be omitted from the list of candidates on the primary election ballot (R. 40). At most it was an abortive effort of respondent to become a candidate. There could, therefore, never be a contest involving the right to a seat in the United States Senate because more than two months prior to the time that respondent was called as a witness before this Sub-Committee, the Supreme Court of Nebraska had ordered his name omitted from the ballot and the primary election, without the name of respondent upon the ballot, had been held forty days before respondent gave the testimony complained of in the indictment.

Furthermore, the power to take testimony to aid the Senate in determining a contest involving the right to a seat in the United States Senate applies not to a remotely anticipated contest and particularly in a case where the inquiry pertains solely to one who was not even permitted to be a candidate before the primary election, but applies to a contest then existing.

Kilbourn v. Thompson, 103 U. S. 168, 26 L. Ed. 377.

Here this Court said:

> "Where the question of such impeachment *is before either body acting in its appropriate sphere* on that subject, we see no reason to doubt the right to compel the attendance of witnesses, and their answer to proper questions, in the same manner and by the use of the same means that courts of justice can in like cases."

In *Morris v. United States* (C. C. A. 7), 261 Fed. 175, the Court said:

> "But to make out a case of perjury another element must be established. The government must show the false testimony was relevant to a *material issue in controversy.*"

VI.

Materiality

The Senate Resolution in question only authorized its Committee to investigate "the campaign expenditures of the various candidates for the United States Senate" (R. 26). The respondent never became a candidate for the United States Senate. At most he transmitted his request that he be permitted to become a candidate and on July 18, 1930, the Supreme Court of Nebraska denied the request.

The indictment alleges that on September 22, 1930, more than two months after the Supreme Court had ruled that respondent could not be a candidate, the respondent falsely testified that he "had not received any money from anyone *in this campaign*" and "had received no assurance from anyone of financial support and backing, or of help in financing *his campaign as a candidate* for the United States Senate." The four questions and answers, which are the basis for the indictment as tried, are as follows:

> "Q. Now what assurance did you have of financial support and backing? A. None whatever.
>
> Q. In your campaign? A. None whatever.
>
> * * * * *
>
> Q. Did you get any assurance from anybody that they would help you—Republican, Democrat, inde-

pendents, or anybody say they would help to finance your campaign? A. No, sir.

* * * * *

Q. Did you receive any money from anybody in the campaign? A. I did not." (R. 32-33.)

Not only was the respondent not a candidate, but the evidence discloses no incident that could in any way be said to be a part of any campaign, this word being defined in Webster's International Dictionary as:

> "A connected series of operations to bring about some desired result. * * * Politics, an organized series of operations or a systematic effort to influence voters, carried on before an election."

The evidence does not contain a word to indicate that either Senator George W. Norris or W. M. Stebbins, who were the only candidates for nomination at this primary election, had anything whatsoever to do with the events shown in the record, or with the funds paid to respondent. The indictment was therefore based upon inquiries that in no wise pertained to a candidate and were therefore wholly immaterial.

Furthermore, there was no campaign nor any part of a campaign by respondent. So far as respondent was concerned any candidacy by him or any campaign, were non-existing things. To convict one of perjury the evidence "must be strong and clear."

Phair v. United States (C. C. A. 3), 60 Fed. (2d) 953.

Not having any campaign, the respondent's answer to the questions were legally truthful and he therefore cannot be held for perjury.

United States v. Slutzki (C. C. A. 3), 79 Fed. (2d) 504.

To make out a case of perjury "the Government must show the false testimony was relevant to a material issue in a controversy."

The Federal Perjury Statute, Title 18, Sec. 231, U. S. C. A.

Morris v. United States (C. C. A. 7), 261 Fed. 175.

United States v. Rhodes, 218 Fed. 518.

But the evidence of the Government in the trial of this case indicated nothing relevant or material to any question in which the United States Senate could properly be interested. The respondent had sent his papers to Lincoln, Nebraska, to file as a candidate for State Railway Commissioner. This no doubt came to the notice of Hugh Drake, the Railway Commissioner, who was a candidate for re-election, and the events narrated in the evidence pertained exclusively to the efforts of Railway Commissioner Drake, his brother and two associates, to prevent respondent from proceeding with his plans to be a candidate for Railway Commissioner by persuading him instead to file as a candidate for the United States Senate.

VII.

To Constitute Perjury It Is Essential That the Oath Be Taken in a "Case in Which a Law of the United States Authorizes An Oath to Be Administered." The Charge of Crime Must Have Clear Legislative Basis

Both at common law and under the Criminal Code the oath must be taken in a proceeding authorized by law. Blackstone, Lord Coke, and Hawkins all define perjury as arising in some "judicial proceeding" or "any

proceeding in a court of justice." The perjury statute, Section 125 of the Criminal Code (Title 18, Sec. 231, U. S. C. A.) is limited to "any case in which a law of the United States authorizes an oath to be administered."

This Court held, in the case of *United States v. George,* 288 U. S. 14, 33 Sup. Ct. 412, which was a prosecution under this same perjury statute:

> "Where the charge is of crime, it must have clear legislative basis."

The resolution under which the Committee in question functioned was only a Senate resolution and it was not a law. Congress alone is vested with legislative powers.

Art. 1, Sec. 1, United States Constitution.

Art. I, Sec. 8, Clause 18, United States Constitution.

To constitute perjury the proceeding, the occasion or purpose of the investigation, must be shown to be one authorized by law.

United States v. George, 228 U. S. 14, 33 Sup. Ct. 412.

United States v. Robertson, 257 Fed. 195.

United States v. Maid, 116 Fed. 650.

Patterson v. United States (C. C. A. 9), 181 Fed. 970.

United States v. Bedgood, 49 Fed. 54.

United States v. Mamon, 44 Fed. 800.

United States v. Dupont, 176 Fed. 823.

State v. Larson, 171 Minn. 246, 213 N. W. 900.

Commonwealth v. Hillenbrand, 96 Ky. 407, 29 S. W. 287.

Respondent, therefore, respectfully submits that the petition for writ of certiorari should be denied. If, however, this Court does take jurisdiction of this cause, respondent urges that the ruling of the Circuit Court of Appeals complained of herein by petitioner, be affirmed and its action in reversing the judgment of the trial court also upheld and this prosecution dismissed for the reasons set forth under subdivisions V, VI, and VII of this brief.

Respectfully submitted,

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Counsel for Respondent.

No. 600

IN THE

Supreme Court of the United States

October Term, 1936

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

GEORGE W. NORRIS,
Respondent.

ANSWER BRIEF OF RESPONDENT

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Law Briefs—OMAHA LINO-SLUG CO.—418 South 15th Street

SUBJECT INDEX

	Pages
QUESTIONS PRESENTED	1
ARGUMENT	2
I. Congress Has No Power to Legislate for the Purpose of Regulating Primary Elections	2
II. To Constitute Perjury It Is Essential That the Oath Be Taken in a "Case in Which a Law of the United States Authorizes an Oath to Be Administered." The Charge of Crime Must Have Clear Legislative Basis	6
III. Materiality	7
IV. The Whole of the Evidence of a Witness Is to Be Taken Together and if the Testimony Be Ultimately True, an Indictment Cannot Be Predicated Thereon	9
CASES CITED BY PETITIONER	11

TABLE OF CASES

Barry v. United States ex rel. Cunningham, 279 U. S. 597	3, 4
Brannan v. State, 94 Fla. 656, 114 So. 429	13, 14
Donnelly v. United States, 276 U. S. 505, 48 S. Ct. 400	5
Ex Parte Chin Chan On, 32 F. (2d) 828	18
Ex Parte Keizo Shibata (C. C. A.) 35 F. (2d) 636	18
Fasulo v. United States, 272 U. S. 620, 47 S. Ct. 200	5
In re Gordon, 167 F. 239 (S. D. N. Y.)	15, 16
In re Wiesebrock, 188 F. 757 (E. D. N. Y.)	15, 16
Johnson v. United States (C. C. A. 9), 41 F. (2d) 44	19

INDEX—Continued

	Pages
Loubriel v. United States, 9 F. (2d) 807	16
Masaichi Ono v. Carr (C. C. A. 9), 56 F. (2d) 772	18
Newberry v. United States, 256 U. S. 232, 41 S. Ct. 465	5
Norris v. United States, 86 F. (2d) 379	12
People v. Freeman, 256 Ill. App. 233	17
Reed v. County Commissioners, 277 U. S. 376	3, 4
Regina v. Holl, 45 Law Times Reports 69 (Q. B. D. 1881)	13
Rex v. Carr, 1 Siderfin 418, 82 Eng. Rep. 1191	11
Rex v. Coote, 10 British Columbia Reports 285	16
Rex v. Simmons, 8 Car. & P. 50	17
Seymour v. United States (C. C. A. 8), 77 F. (2d) 577	6
Sinclair v. United States, 279 U. S. 263, 49 S. Ct. 268	4, 5
Speeter v. United States (C. C. A. 8), 42 F. (2d) 937	5
United States v. Lacher, 134 U. S. 624, 10 S. Ct. 625	5

SENATE RESOLUTION

Senate Resolution No. 215, April 10, 1930 3

CONSTITUTION

Art. 1, Sec. 5, Clause 1, United States Constitution 3

No. 600

IN THE

Supreme Court of the United States

October Term, 1936

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

GEORGE W. NORRIS,
Respondent.

ANSWER BRIEF OF RESPONDENT

This brief supplements the brief heretofore filed by respondent in opposition to petition for writ of certiorari, and answers the brief of petitioner filed herein after the writ of certiorari was granted.

QUESTIONS PRESENTED

Petitioner states four certain questions as being those presented in this case, three of which, the first, second and fourth, are incorrectly stated. We will make the cor-

rections as to these questions under the separate headings, following in this brief, the same order as in the recent brief of petitioner.

ARGUMENT

I.

Congress Has No Power to Legislate for the Purpose of Regulating Primary Elections

Petitioner states the first question as being, "Whether the Senate Committee was competent to institute, and to exact evidence in, the inquiry in which respondent testified." This is by far too broad a statement of the issue. The Senate Resolution in question authorized the investigation of campaign contributions of candidates both before "senatorial primaries" and "in the general election in November, 1930."

The questions which were put to respondent by the Senate Committee in question, and which are the basis for the indictment herein, at most could pertain only to the 1930 (August 12) primary election in Nebraska and in no respect to any candidacy or any campaign of any candidate for United States Senator.

While it may be conceded that in case of an actual contest of the election of a United States Senator, a Senate Committee has power to inquire concerning campaign expenditures of candidates for the Senate at the general election, the question here at issue is whether or not the Committee had the power to investigate matters pertaining solely to the state primary election which was held on August 12, 1930, a month and ten days prior to

the day when respondent first testified and which inquiry also in no wise pertained to the candidacy or any campaign of any person for the United States Senate.

The evidence which was elicited by these questions propounded to respondent in no sense pertained to the general election. These questions developed proof only to the effect that respondent paid to the County Treasurer of Custer County, Nebraska, the filing fee as a candidate for State Railway Commissioner, sent the treasurer's receipt and his application requesting that his name be placed upon the ballot as a candidate for that office at the primary election, to a friend in Lincoln to be later filed. Thereafter he was approached, as related in our original brief, by A. Paul Johnson, who sought to persuade the defendant "not to file as a candidate for Railway Commissioner but instead to file" as a candidate for the Republican nomination for United States Senator at the primary election to be held in August, 1930 (R. 27, 34).

Petitioner asserts that "potential judicial action justified the Senate in passing Resolution No. 215" and the exacting of evidence of respondent by the Committee appointed under said resolution because under article 1, section 5, clause 1 of the Constitution it is provided that "Each House shall be the Judge of the Elections * * * of its own Members," and cites the cases of *Reed v. County Commissioners,* 277 U. S. 376, 388; *Barry v. United States ex rel. Cunningham,* 279 U. S. 597, 613.

It will be noted, however, that these two cases pertaining to the contest of the election of one Vare to the United States Senate. As stated in the Barry case, Vare had received a certificate of election to the Senate and "presented himself to the Senate, claiming all the rights

of membership." "Thereby," said this Court, "the jurisdiction of the Senate was invoked and its power to adjudicate such right immediately attached by virtue of section 5 of article 1 of the Constitution."

In the Reed case the opinion states that "Vare was given the certificate of election, and Wilson initiated a contest." Thereafter the Senate Resolution in question was passed, reciting the charges that were made in the contest of Vare's election and efforts were made to take and preserve the ballot boxes, ballots, return sheets, records, etc. Thus there was an actual contest of a seat in the Senate at issue, but in the case at bar there was no contest or issue, even remotely possible, that would involve any seat in the Senate. There was no question before the Senate involving any controversy. The inquiries propounded to respondent did not pertain to the acts or doings of any candidate for the United States Senate.

This Court said, in *Sinclair v. United States*, 279 U. S. 263, 49 S. Ct. 268:

> "It has always been recognized in this country, and it is well to remember, that few if any of the rights of the people guarded by fundamental law are of greater importance to their happiness and safety than the right to be exempt from all unauthorized, arbitrary or unreasonable inquiries and disclosures in respect of their personal and private affairs."

But petitioner asserts in its brief (Op. Br. 26):

> "Before the Committee actually made inquiry of the respondent is was *reasonable to suppose* that this campaign had been financed not by the Republican party or by some defeated Republican aspirant like

> Stebbins, but had been financed by the Democratic party or even by the successful candidate in the Democratic primary. The Democratic candidate *might* justifiably have concluded that he could win only if his Republican opponent was someone other than Senator Norris; and that the only way to prevent the Senator's re-nomination was to finance the respondent. That this argument is not attenuated, but is based on a *possibility* in the mind of the Senate Investigating Committee, is shown by the record."

But a criminal prosecution cannot be based upon suppositions, possibilities, or conclusions that might be drawn, for "no one can be punished for crime against the United States unless facts shown plainly and unmistakenly constitute an offense within the meaning of an Act of Congress." *Speeter v. United States* (C. C. A. 8), 42 F. (2d) 937 (above quotation from opinion in this case); *Donnelly v. United States*, 276 U. S. 505, 48 S. Ct. 400; *United States v. Lacher*, 134 U. S. 624, 10 S. Ct. 625; *Fasulo v. United States*, 272 U. S. 620, 47 S. Ct. 200.

This Court said in *Newberry v. United States*, 256 U. S. 232, 41 S. Ct. 465:

> "We cannot conclude the authority to control *party primaries* or conventions for designating candidates was bestowed on Congress by the grant of power to regulate the manner of holding elections. The fair intendment of the words does not extend so far; the framers of the Constitution did not ascribe to them any such meaning. Nor is this control necessary in order to effectuate the power expressly granted. On the other hand, its exercise *would interfere with purely domestic affairs of the state* and infringe upon liberties reserved to the people."

(All italics in this brief are by the author.)

In *Seymour v. United States,* 77 F. (2d) 577, 579 (C. C. A. 8), the Court said:

> "and it is true that the inquiry here was concerned wholly with a primary election; that is, it may be conceded that Congress had no power to legislate for the purpose of regulating primary elections, such as involved in this inquiry."

This subject is discussed at pages 17 to 20 of our original brief. It is closely akin to that of Materiality, discussed in this brief under number III.

II.

To Constitute Perjury It Is Essential That the Oath Be Taken in a "Case in Which a Law of the United States Authorizes an Oath to Be Administered." The Charge of Crime Must Have Clear Legislative Basis

Petitioner states the second question presented as being, "Whether there was a *law* of the United States authorizing an oath to be administered in that inquiry." That, however, is not the issue raised by respondent. Rather the issue is as stated in the first paragraph of the argument in the brief of petitioner (p. 20), wherein the petitioner states:

> "A person can be properly indicted and convicted under Section 125 of the Criminal Code *only* if it is proved * * * (2) *that the proceeding* in which he took the oath was one *'in which a law of the United States authorizes an oath to be administered,'* " etc.

This is a correct statement of the rule. It is not a question of whether or not Senator Nye had the power or authority to administer the oath, but the question is whether it was a "proceeding" "in which a law of the

United States authorizes an oath to be administered." Petitioner is in error in saying that this issue was decided in favor of the Government by the Court below. It was briefed and argued, but is not referred to in the opinion of the Circuit Court of Appeals. Respondent on pages 22 and 23 of his brief, in opposition to petition for writ of certiorari, quotes from decisions of this Court which clearly establish the necessity that there be a proceeding or "case in which a law of the United States authorizes an oath to be administered." There is a vast difference between the authority to administer an oath and a proceeding or case under a law of the United States. The brief of petitioner does not answer this question in any respect.

III.

Materiality

Petitioner correctly states the issue as to materiality thus:

> "Thus the principal subjects of investigation were the 'campaign expenditures,' the campaign subscriptions, and 'all facts in relation thereto,' of *'the various candidates for the United States Senate.'*" (Op. Br. 30)

Respondent never was a candidate, and had no campaign. The inquiries, the answers to which are the basis of the indictment, pertained to non-existent things and were in every sense immaterial. This subject is presented on pages 20, 21 and 22 of the original brief of respondent. But petitioner states and cites authority for the rule, that "anyone is a candidate for whom a vote is asked." (Op. Br. 31) The evidence in this case indicates that no vote was ever asked or sought in any way of anyone for respondent for any office whatever. The

most that he did was to send in an application requesting that his name be placed upon the primary election ballot as a candidate for the Republican nomination for United States Senator, which application was received two days after the time limited for filing the same, and the request was therefore denied. The evidence is wholly devoid of any form of request of anyone to vote for him or support him in any way as a candidate for any office.

The record of the case fails to show a single incident or thing done that could in anywise be interpreted as any act in connection with a campaign.

Petitioner cites this Court's holding that the power to judge of elections "carries with it authority to take such steps as may be appropriate and necessary to secure information upon which to decide concerning elections." But in the case at bar the election had not yet been held. There was no contest in existence, no issue anywhere to be determined. Can it be that a senate committee may wander throughout the nation calling whomsoever it will and take testimony pertaining to any and all subjects in anticipation that a contest may arise over the election of a United States Senator? If so, since we elect 32 senators every two years and since there are usually several candidates of each party in each state, such a roving senate committee would have the power to investigate matters pertaining to all candidates at primary elections of all parties and would thus have under their scrutiny the acts and doings of possibly two hundred men and their friends and supporters every two years, solely to gather evidence for a possible contest of an election, which most likely would never occur, and as did not occur in Nebraska in 1930.

Such possibilities and uncertainties are insufficient justification for a committee authorized by a senate resolution to travel the length and breadth of our land to take testimony in regard to no matter at issue.

IV.

The Whole of the Evidence of a Witness Is to Be Taken Together and if the Testimony Be Ultimately True, an Indictment Cannot Be Predicated Thereon

The petitioner incorrectly states the fourth question presented herein as being "Whether the respondent ceased to be a perjurer by retracting his false testimony the day after it had been given and he had left the stand." (Op. Br. 2)

The true question at issue is whether or not the whole of the evidence of a witness is to be taken together and if it be ultimately true, that the same does not constitute perjury. A thing is not judged by its individual parts but is judged by the whole. A corrected mis-statement forms no part of the evidence after the correction is made. It is no longer the assertion of a fact.

In respondent's original brief the rule and the authorities are set forth on pages 10 to 15. There are no contrary decisions and none have been cited by petitioner.

Petitioner is in error in its brief in stating that respondent concluded his testimony about 4:00 P. M. on September 22, 1930, that the committee "never expected or asked the respondent to return to the stand," and that respondent "of his own motion asked, and was granted, permission to return to the stand." The same error is

made in stating that respondent had completed his testimony on September 22. The record (p. 27) states "the defendant Norris was recalled to the witness stand the next day, September 23, 1930. * * * he was questioned by Senator Nye on this second day."

Since the proceeding was ex parte, being conducted solely by the Senate Committee, presided over by its chairman, Senator Nye, the Senate Committee must have been the one who recalled respondent to the witness stand for further testimony. At that time he was living in Oklahoma, from whence he was called to appear before this Senate Sub-Committee at Lincoln, Nebraska. Since he was recalled to the witness stand upon the second day, his continued attendance must have been at the behest of the Committee and all of his testimony so given would be taken and considered together.

Petitioner purports to state in its brief (p. 12) that the testimony of A. Paul Johnson in the instant case was substantially the same as the testimony which he gave before the Senate Sub-Committee on September 22, and 23, 1930. The record is entirely silent as to the testimony that A. Paul Johnson gave before the Senate Sub-Committee.

Petitioner asserts that seven witnesses testified between the time when respondent testified on the 22nd and 23rd days of September, 1930, but the record does not indicate the subjects concerning which any of them gave evidence other than A. Paul Johnson, who corrected his testimony immediately before respondent was recalled to the witness stand.

Petitioner states that respondent contends that he ceased to be a perjurer by retracting his testimony. This is not the position of respondent. His position is that

all of his testimony given upon this occasion upon September 22 and 23, 1930, must be taken together and no one part of his testimony may be separated and torn from the other so as to make the separate part constitute perjury. One oath only was administered to respondent and all of his testimony on both days was given under this one oath. Petitioner is not justified in saying that respondent had left the stand. It occurred in this case, as it often does with witnesses, that they are called to the stand and later recalled. It virtually was the giving of testimony upon one occasion only, though the hours of night intervened between the giving of his testimony on one day and before he gave further testimony again on the second day.

Petitioner attempts (Op. Br. p. 45) to distinguish the case of *Rex v. Carr*, 1 Siderfin 418, 82 Eng. Rep. 1191, from the one at bar and states that the original answer was ambiguous wherein it stated that the defendant, Dame Carr, had filed an answer setting forth that "she received no money." It is hard to figure how language could be more definite. The second answer states that "she received no money before such a day." It was in direct opposition to the first.

Cases Cited by Petitioner

There being no decided cases holding to the position for which petitioner contends, it has gone far afield in search of authorities and has presented in its brief various decisions in habeas corpus, contempt and larceny cases. Even many of these not only fail to support petitioner's contention but that of respondent.

One case only supporting the rule for which petitioner contends is cited and quoted thus:

> "'When false testimony concerning a material fact has been knowingly given, perjury has become and continues to be an accomplished and completed thing.' Seymour v. United States, 77 F. (2d.) 577, 582 (C. C. A. 8)" (Op. Br. 33-34)

But the Court that held this, less than two years later, with two of the same judges sitting (Sanborn and Faris), reversed this holding in deciding the present case below, and said that this statement was "obliter dictum merely" and "in fairly direct contradiction to what we deem the true rule of law." *Norris v. United States*, 86 F. (2d.) 379. (R. 57) In the same opinion the Court said:

> "As early at least, as 1669 (See, Roy v. Carr, 1 Siderfin's Rep. 418) it was held by the King's Bench in England, that a false answer in chancery is purged of perjury, if, in a subsequent answer filed in the cause, the false answer is corrected. From the above case seemingly, the well-settled modern rule had its origin. This rule is well stated in Bishop on Criminal Law (9th Ed.) Sec. 1044a, thus:
>
> "'The law encourages the correction of erroneous and even intentionally false statements on the part of a witness and perjury will not be predicated upon such statements when the witness, before the submission of the case, fully corrects his testimony. Says the New York Supreme Court "a judicial investigation, or trial has for its sole object the ascertainment of the truth, that justice may be done, it holds out every inducement to a witness to tell the truth by inflicting severe penalties upon those who do not. This inducement would be destroyed if a witness could not correct a false statement except by running the risk of being indicted and convicted of perjury."'
>
> "Ruled cases upon the point are few, but so far as we can find unanimous in upholding the view of the

law on the point taken in Mr. Bishop's excellent work, quoted above. (See, People v. Brill, 165 N. Y. S. 65; Henry v. Hamilton, 7 Blackf. (Ind.) 506; People v. Gillette, 111 N. Y. S. 133; Brannon v. State, 94 Fla. 656, 114 So. 429; Bijur v. Bendix, 285 F. 974. In fact no case, called to our attention by counsel, or which we have been able to find, contravenes the law upon the point as written by Mr. Bishop, Even two of the three cases cited herein by appellee affirm it as being the law." (R. 56)

Petitioner in its brief quoted from the observations of justices in the case of *Regina v. Holl*, 45 Law Times Reports 69 (Q. B. D. 1881) in part as follows:

> "COLERIDGE, C. J.—The argument on behalf of Mr. Edwards seems to me to be this. A witness may tell the Commisioners a deliberate tissue of falsehoods, trusting that the witnesses who could disprove them are being kept out of the way, but when finding that they are forthcoming, may come forward and say, 'All that I told you before was false; but now the truth is out I may as well acknowledge it,' and yet is entitled to his certificate. BOWEN, J.—I think there is just this amount of colour in the argument of the other side, *that an indictment for perjury could not be sustained on an answer afterwards corrected or explained.*" (Op. Br. 51)

The quotation should also have continued to include the next sentence, which reads:

> "Quite so, if corrected at the time; but, not, as in this case, after a long interval of time."

In a footnote of the brief of petitioner, page 59, referring to the case of *Brannan v. State*, 94 Fla. 656, 114 So. 429, involving the chastity of a woman concerning whom the defendant first testified that he had seen one

Thomas embrace her on Easter Sunday and later testified that he was not positive whether it was Easter Sunday, the Sunday before or the Sunday after, petitioner asserts in its brief (p. 60) that the defendant in that case had not been contradicted when he corrected his testimony. Such, however, is not the case for the opinion discloses that the defendant positively testified that he was "there this Easter Sunday a year ago * * * about 2 o'clock in the afternoon * * * sat there talking I guess 5 or 10 minutes, and happened to look toward the house, and I saw W——— P——— and somebody leave the front room and walk into the back room and he had his arms around her." After he had so testified "The state further introduced credible and unassailed evidence from which it could be lawfully found or inferred that the defendant could not have observed, on Easter Sunday, 1925, the events recounted by him in the foregoing testimony, because the young woman in question was away from her home on that day from about 9 o'clock a. m. until about 6 o'clock p. m., or later. The state thereupon rested."

After this testimony defendant returned to the stand and said he "was not positive that it was Easter Sunday, or the Sunday before or the Sunday after" and asked permission to return to the witness stand and correct that portion of his testimony. The Court permitted him to do so and he did correct his testimony. The Court held that having corrected his testimony, he was not guilty of perjury.

On page 61 of petitioner's brief, Judge Dietrich is quoted as saying in Ex Parte Keizo Shibata, with reference to the Gillette case, that it meant no more than that "where a witness who has given false testimony re-

tracts it before he leaves the witness stand, it cannot be made the basic of a perjury charge." That, however, was the situation in the case at bar. While the respondent was yet in attendance upon the Senate Committee, having been called from his home in Oklahoma to Lincoln, Nebraska, and before he was excused, he gave further testimony and corrected any errors that existed in his former evidence.

On page 60 of its brief, petitioner asserts:

> "Thus in bankruptcy cases both District Judge Holt and District Judge Chatfield have indicated that a bankrupt who first denies that he has any assets and then admits the contrary should be prosecuted for perjury. In re Gordon, 167 Fed. 239, 240 (S. D. N. Y.); in re Wiesebrock, 188 F. 757, 758 (E. D. N. Y.)"

But *In re Gordon, supra,* Judge Holt in deciding the case, said:

> "But there is another ground upon which I prefer to put my decision in this case, and that is the importance of not discouraging bankrupts who have given false testimony from afterwards admitting the truth. Almost every bankrupt who has intentionally concealed his property before bankruptcy concocts a false explanation, and, when he is examined, at first gives false testimony in support of such a fabricated explanation. It frequently happens that a bankrupt, after cross-examination has exposed the improbability of absurdity of the evidence given, would be willing to confess the truth, if he were not afraid of the consequences of the false evidence that he has given. In such cases he must take the chances of a prosecution for perjury; but, so far as the charge of contempt is concerned, I think that he should be regarded as having purged his contempt if he has, at any time in the course of his examination, given such full and

truthful information concerning his estate as the creditors have a right to require. I think, therefore, as a general rule, that, in cases in which the bankrupt has begun by giving even intentionally false testimony, if, during the course of the same examination, he changes his mind and testifies truthfully, he ought not to be punished for contempt."

And in the Wiesebrock case the bankrupt testified falsely in an attempt to conceal assets, but later much of the false testimony was admitted or corrected by the bankrupt, and Judge Chatfield said in the opinion:

> "But even then the bankrupt would have been allowed to purge himself of contempt, in so far as he could by giving correct testimony or information as to the property."

There is no statement in either of these cases that such a one "should be prosecuted for perjury." In fact, in the latter case the opinion states "that the matter was referred to the district attorney" and he "informed the Court that no action was deemed advisable."

Also the quotation in petitioner's brief (Op. Br. 61) from the decision of Judge Hand in *Loubriel v. United States,* 9 F. (2d) 807, reading "Perhaps all a man's testimony upon a continued inquiry must be taken together, and no prosecution will lie *if he recants before he is through,*" sustains the position of respondent.

In the case of *Rex v. Coote,* 10 British Columbia Reports 285, 290, also is cited by petitioner (Op. Br. 47), the first two paragraphs of the opinion read:

> "MARTIN, J.: As to the first question reserved for the consideration of this Court, it should, in my opinion, be answered in the affirmative, because it

is clearly established by the authorities I referred to during the argument that on such a charge the accused is entitled to have laid before the jury at least any portion of his evidence at the former trial out of which the accusation arose which would explain or qualify the statement alleged to be a perjury; Rex v. Carr (1669), 1 Siderfin 418-9; Rex v. Jones (1791), Peake 51; Rex v. Dowlin (1792), ib. 227; Reg. v. Britton (1893), 17 Cox C. C. 627; 1 Russell on Crimes (1896), 378-9; Roscoe's Criminal Evidence (1898), 727; Archbold's Criminal Pleading (1900), 1,008-9.

"Here there was evidence of that nature which may well have had weight with the jury, and the failure to lay it before them is a 'substantial wrong' within the meaning of section 746 of the Criminal Code; Reg. v. Hamilton (1898), 2 C. C. C. 390."

In the case of *People v. Freeman*, 256 Ill. App. 233, cited by petitioner (Op. Br. 53), it was held that the witness was guilty of contempt of Court though he had testified falsely and the witness admitted that 'he had lied, and that his answers to the questions on his direct examination were false."

But Mr. Presiding Justice Wilson, in the opinion, said:

"It is not necessary in our opinion that such testimony, however, should be of the same kind and character as would be necessary to support a charge of perjury."

Neither does the case of *Rex v. Simmons*, 8 Car. & P. 50 (Op. Br. 43) mention the subject of retraction, as indicated by the petitioner in its brief. (Op. Br. 43)

By letter, counsel for petitioner has advised respondent that in addition to the material appearing in the

printed brief, petitioner will refer to the case of *Masaichi Ono v. Carr,* 56 F. (2d) 772 (C. C. A. 9), which was a habeas corpus proceeding against a district director of the United States Immigration Service. The petitioner in that case and his wife had applied to immigration authorities for admission to the United States and had testified falsely on November 12, 1930, that he had paid $30,000 for an interest in a co-partnership. He again testified on November 18 and November 19, and the opinion states "it was not until the fourth appearance before the immigration authorities, on November 21, 1930, that the applicant admitted that his testimony was false."

The opinion states that petitioner filed two applications to enter the United States and recites other facts showing a planned effort, by hook or crook to enter the United States. The opinion reads in part:

> "It is argued that in view of the fact that the applicant changed his testimony before his original application was finally passed upon, he was not guilty of perjury although he concedes that he did swear fasely upon his application. Assuming without deciding that such is the rule where a retraction is seasonably and voluntarily made, it was *too late* to come under the rule. Ex parte Keizo Shibata (C. C. A.) 35 F. (2d) 636; Johnson v. U. S. (C. C. A.) 41 F. (2d) 44."

In the same letter counsel state they will refer also to the case of *Ex parte Chin Chan On,* 32 F. (2d) 828, also a habeas corpus case of a Chinaman who sought admission to the United States and first testified on January 23, 1929, again on February 20, and lastly on March 11 of the same year. On this latter date he admitted that he had practiced polygamy in China.

In this letter, counsel refer to the case of *Johnsen v. U. S.* (C. C. A. 9), 41 F. (2d) 44, but here the Court said, referring to the case of Keizo Shibata, 35 F. (2d) 636:

> "Considering the reasons there suggested, *it may be that a retraction seasonably and voluntarily made should be encouraged by relieving the party of the consequences of perjury;* but, in the absence of a ruling by the trial court upon a record made up carefully and fully to present the circumstances surrounding the alleged retraction, we do not feel warranted in deciding a question of such importance."

Respondent therefore submits that the decision of the Circuit Court should not be reversed upon this issue, that it should be affirmed for the other reasons set forth herein, and that this action should be dismissed.

Respectfully submitted,

WILLIAM E. SHUMAN,
Counsel for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 600.—October Term, 1936.

The United States of America, Petitioner, *vs.* George W. Norris.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[March 29, 1937.]

Mr. Justice Roberts delivered the opinion of the Court.

The record in this case presents an important question of federal criminal law which has not been settled by our decisions. Does retraction neutralize false testimony previously given and exculpate the witness of perjury?[1]

April 10, 1930, the United States Senate, by resolution, empowered the Vice-President to appoint a special committee to investigate campaign expenditures of candidates for the Senate, the committee to sit at such times and places as it should deem proper, to require attendance of witnesses and production of books and papers, and to act by any subcommittee. Failure to obey process of the committee or refusal to answer questions pertinent to the investigation was to be punished according to law. The resolution recited that the Senate desired facts to aid it in enacting remedial legislation and in deciding contests involving senatorial elections.[2] The committee so appointed authorized Senator Nye, the Chairman, to act as a subcommittee and to name a subcommittee of one or more members. Such a subcommittee, consisting of Senators Nye and Dale, met September 22, 1930, at Lincoln, Nebraska. The Nebraska primary election had been held on August 12, 1930; the general election at which the names of senatorial candidates were to appear on the ballots was to be held the following November. Senator George W. Norris of McCook, Nebraska, had filed for the Republican primaries on January 1, 1930, and W. M. Stebbins had, on November 12, 1929, filed

[1] Compare *Loubriel* v. *United States*, 9 F. (2d) 807, 808; *Ex parte Chin Chan On*, 32 F. (2d) 828; *Ex parte Keizo Shibata*, 35 F. (2d) 636; *Johnsen* v. *United States*, 41 F. (2d) 44, 46; *Masaichi Ono* v. *Carr*, 56 F. (2d) 772; *Seymour* v. *United States*, 77 F. (2d) 577, 582.

[2] Senate Resolution No. 215, 71st Cong., 2d Sess., 72 Cong. Rec. 6841-6842.

his acceptance of Republican nominating petitions in his behalf. The respondent had attempted to file for the same primaries on July 5, 1930, but the Supreme Court of the State had ruled on July 18th that his application was not filed within the time prescribed by law and had ordered the Secretary of State to omit his name from the list of candidates for United States Senator to be certified to county clerks and election commissioners.[3] In the light of these facts the subcommittee summoned the respondent to testify on September 22, 1930. He was called and sworn to tell the truth and the whole truth. He narrated something of his personal history and said his original intention was to run for State Railway Commissioner, but he did not file for that office because he thought about filing for United States Senator. He gave the following testimony:

"Q. Now what assurance did you have of financial support and backing?

A. None whatever.

Q. In your campaign?

A. None whatever.

. . . . . .

Q. Did you get any assurance from anybody that they would help you—Republican, Democrat, independents, or anybody say they would help to finance your campaign?

A. No, sir.

. . . . . .

Q. Did you receive any money from anybody in the campaign?

A. I did not."

After the conclusion of his testimony the subcommittee adjourned until the following day, when several witnesses were examined, amongst whom was one Johnson. The respondent was present and heard Johnson testify. After consulting his counsel he asked and was granted permission to return to the stand. He then admittted the receipt from Johnson of $50 to be used for his filing fee and a $500 government bond, and stated that he had cashed the bond through his brother at North Platte.

June 23, 1931, the grand jury for the District of Nebraska indicted the respondent for perjury under Section 125 of the Criminal Code.[4] On his trial the government proved the facts as above

[3] *State, ex rel. Smith* v. *Marsh*, 120 Neb. 287, 289.

[4] "Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath

outlined and called Johnson as a witness who testified that, pursuant to a plan devised by himself and others, he had approached the respondent on June 30th and requested him not to file as a candidate for Railway Commissioner but to file for United States Senator telling him that if he were willing to do this the Republican Party would support him and $50 would at once be paid him for his filing fee and $500, the estimated amount of his campaign expenses, would also be paid to him. He swore that, on July 2nd, he gave the respondent $50 and, on the next day, handed him a $500 bond.

The respondent took the witness stand and admitted that he "knew at the time of testifying [before the Senate Committee] that he had received $500 and $50 and what he was saying was not true."

In charging the jury the judge stated that the respondent could not be convicted if he testified carelessly, negligently or hastily but the jury must find that his testimony was intentionally untrue and that he did not believe it true when he gave it. And, respecting the retraction of his former testimony, the judge stated that the jury might consider the retraction along with the other evidence "on the question of whether or not considering what the defendant testified on the day prior and his act of testifying again the following day and what he said in his testimony, the defendant wilfully, that is, intentionally testified falsely in his testimony on the day before in the matters charged against him."

The respondent requested the following instructions:

"The Jury are instructed that even if you find that the defendant in this case made false answers to the questions which were put to him at the hearing before the Senate Committee in question, and if you also find that while this hearing was yet continuing and while the matter was yet pending before the Senate Committee, the defendant corrected any erroneous or false statements that were made, if any, then you will find the defendant not guilty."

"The Jury are instructed that if you find the defendant, in the latter portion of his examination before the Senate Committee, corrected statements that may have been incorrect or even intentionally

to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than $2,000 and imprisoned not more than five years." R. S. § 5392; 18 U. S. C. § 231.

false, made prior to the correction of the defendant, then you will find the defendant not guilty."

These were refused and an exception granted. The jury rendered a verdict of guilty, sentence was imposed, and the respondent appealed to the Circuit Court of Appeals which reversed the judgment,[5] holding that the trial court erred in refusing to submit to the jury the question whether the respondent had fully and fairly retracted and corrected his original false statements. In the course of its opinion the court stated the following would have been a proper charge and failure to give a charge of such tenor was reversible error:

"The jury are charged that the law encourages the correction of erroneous and even intentionally false statements made by a witness upon a trial or hearing, and so, if you shall find and believe from the evidence that defendant made false answers to the questions or any of them which were put to him at the hearing before the Senate Subcommittee (which questions are set out in the indictment and which questions the court has already in this charge called specifically to your attention), yet that defendant, while the hearing was continuing and unfinished again took the witness stand and then and there fully corrected all erroneous or false statements, if any, which had theretofore been made by him in answer to said questions, you should find the defendant not guilty."

The respondent insists that reversal of his conviction was right because (1) Congress exceeded its power in adopting Resolution No. 215 since it cannot legislate for the purpose of regulating primary elections; (2) perjury can only be committed if an oath be taken in a case wherein a law of the United States authorizes an oath to be administered, and the committee hearing was not such a case; (3) the false testimony concerned an immaterial matter and (4) the whole of a witness' evidence must be taken together and, if his testimony be ultimately true, his indictment for perjury cannot be predicated thereon.

Little need be said with respect to the first three positions. That it is within the constitutional province of Congress to institute investigations and to compel evidence with a view to possible exercise of its legislative function[6] or possible discharge of its duty to determine the validity of the election of its members[7] is settled.

[5] 86 F. (2d) 379.

[6] *McGrain* v. *Daugherty*, 273 U. S. 135.

[7] *Barry* v. *United States*, 279 U. S. 597.

R. S. Sec. 101,[8] is a law of the United States authorizing any member of either house of Congress to administer oaths to witnesses in any matter pending in either house of Congress or any committee thereof. The materiality of the respondent's false answers is clear in view of the scope of the inquiry. The resolution authorized the committee "to investigate the campaign expenditures of the various candidates for the United States Senate, the names of the persons . . . subscribing, the amount contributed, the method of expenditure, and all facts in relation thereto . . . ."

We come to the substantial question which moved us to grant the writ of certiorari. We hold the District Judge was right in refusing to charge as requested by the respondent and the judgment should not have been reversed on account of his failure so to do. The respondent admitted he gave intentionally false testimony on September 22nd. His recantation on the following day cannot alter this fact. He would have us hold that so long as the cause or proceeding in which false testimony is given is not closed there remains a *locus poenitentiae* of which he was entitled to and did avail himself. The implications and results of such a doctrine prove its unsoundness. Perjury is an obstruction of justice; its perpetration well may affect the dearest concerns of the parties before a tribunal. Deliberate material falsification under oath constitutes the crime of perjury and the crime is complete when a witness' statement has once been made. It is argued that to allow retraction of perjured testimony promotes the discovery of the truth and, if made before the proceeding is concluded, can do no harm to the parties. The argument overlooks the tendency of such a view to encourage false swearing in the belief that if the falsity be not discovered before the end of the hearing it will have its intended effect but, if discovered, the witness may purge himself of crime by resuming his role as witness and substituting the truth for his previous falsehood. It ignores the fact that the oath administered to the witness calls on him freely to disclose the truth in the first instance and not to put the court and the parties to the disadvantage, hindrance, and delay of ultimately extracting the truth by cross examination, by extraneous investigation or other collateral means.

Notwithstanding the fact that the testimony originally given and allowed then to stand as his final statement on the subject of in-

[8] U. S. C. Tit. 2, § 191.

quiry falls clearly within the definition of Section 125 of the Criminal Code the respondent insists that the authorities, English and American, demonstrate that his retraction before the conclusion of the proceedings in which he testified absolve him and preclude a conviction. Perjury has been a common law crime since at least the seventeenth century. Quite generally the conception embodied in the common law definition of perjury has been embodied in statutes. This is true of Section 125. But it cannot be said that there is any respectable body of authority under the common law or statute in England or in the United States to support the respondent's position. On the contrary, the cases in which the courts have dealt directly and specifically with the question here for decision are surprisingly few. The respondent plants himself upon *Roy* v. *Carr*, 1 Siderfin 418, 82 Eng. Rep. 1191, a case decided in 1669 which he claims established the doctrine for which he contends and has been followed both in England and in this country. A critical examination of the case arouses grave doubt that it held, or was intended to hold, that a retraction of a witness' false testimony negatives the commission of perjury and in later cases the English courts have so intimated and have said that if it stood for such a proposition it probably would not be followed.[9] Several later English decisions squint in the opposite direction and some of them come near to refute the respondent's argument with respect to the English law.[10]

Decisions of state courts of last resort in this country do not make a much better case for the argument. One state supreme court seems to have held directly in accordance with the contention in an appeal from a conviction of perjury.[11] One lower court case is in accord.[12] In one state court of last resort wherein the question arose in a slander suit where the defendant was alleged to have improperly charged a witness with having committed perjury in another proceeding, the court answered it favorably to respondent's claim.[13] The Appellate Division of the Supreme Court of New

[9] *Edwards* v. *M'Leay*, 2 Vesey & D. 256, 258, 35 Eng. Rep. 316; *Reg.* v. *Holl*, 45 Law Times Rep. 69.

[10] *Rex* v. *Thorogood*, 8 Mod. 179, 88 Eng. Rep. 131; *Allen* v. *Westley*, Hetley 97, 124 Eng. Rep. 372; *Reg.* v. *Philpotts*, 5 Cox's Crim. L. Cas. 363; *Reg.* v. *Holl*, 45 Law Times Rep. 69.

[11] *Brannen* v. *State*, 94 Fla. 656, 114 So. 429.

[12] *Comm.* v. *Irvine*, 14 Pa. D. & C. Rep. [illegible].

[13] *Henry v. Hamilton*, 7 Blackf. (Ind.) 500.

York has definitely held with the respondent upon the point in a case where the witness corrected his false testimony immediately and told the truth although, in that case, the conviction was reversed on several grounds any one of which would have been adequate for reversal.[14] The Court of Appeals of New York has not spoken on the subject and in a later case a lower court has refused to follow the decision mentioned where the contradictory statement was not part of the same examination at which the false statement was made.[15]

While we should accord respectful consideration to decisions of the English and American courts supporting the respondent's view, the research of counsel and our own examination discloses that there is no substantial body of authority favoring it. As will appear by scrutiny of the cases cited in Note 1, the lower federal courts have not dealt with the question often and while their expressions may not be entirely consonant it may be said that they preponderate against the respondent's contention. We are free, therefore, to give such meaning and effect to Section 125 of the Criminal Code as in justice we think ought to be attributed to it. The plain words of the statute and the public policy which called for its enactment alike demand we should hold that the telling of a deliberate lie by a witness completes the crime defined by the law. This is not to say that the correction of an innocent mistake, or the elaboration of an incomplete answer, may not demonstrate that there was no wilful intent to swear falsely. We have here no such case.

The judgment of the Circuit Court of Appeals must be reversed and that of the District Court affirmed.

So ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[14] *People* v. *Gillette*, 126 App. Div. 665.

[15] *People* v. *Markan*, 123 Misc. 689, 206 N. Y. Supp. 197.